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No. .....

IN THE

Supreme Court of the United States

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

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Questions Presented for Review.

1. Whether the President has statutory or inherent constitutional authority to settle legally enforceable claims of American citizens against foreign states, agencies, and controlled entities pending in United States courts and nullify judgments of United States courts adjudicating such claims?

2. Whether the President has statutory or inherent constitutional authority to nullify attachment liens and judgment liens imposed by process of United States courts on property of foreign states, agencies, and controlled entities to secure or satisfy legally enforceable claims and judgments of American citizens and to order the transfer of such property out of the reach of process of United States courts?

3. Whether Presidential action substantially diminishing or destroying the value of legally enforceable claims of American citizens against foreign states, agencies, and controlled entities is an unconstitutional taking of property?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes, Executive Agreements, Executive Orders, and Regulations Involved	2
Statement of the Case	3
Reasons for Seeking Review Before Judgment by the Court of Appeals	9
Reasons for Granting the Writ	10
Conclusion	25

TABLE OF AUTHORITIES

Cases	Page
American Int'l Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir., decided May 22, 1981) ..	13
Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir., decided May 22, 1981)	13
Guessefeldt v. McGrath, 342 U.S. 308 (1952)	24
Miller v. United States, 583 F.2d 857 (6th Cir. 1978)	17
Propper v. Clark, 337 U.S. 472 (1949)	20, 23
United States v. Belmont, 301 U.S. 324 (1937) ..	14, 15
United States v. La Abra Silver Mining Co., 29 Ct. Cl. 432 (1894)	17
United States v. Pink, 315 U.S. 203 (1942)	14, 15
United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)	14, 15
United States ex rel. Keefe v. Dulles, 222 F.2d 390 (D.C. Cir. 1954) cert. denied, 348 U.S. 952 (1955)	17
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	11, 12, 19
Z. & F. Assets Realization Corp. v. Hull, 311 U.S. 470 (1941)	16
Zittman v. McGrath, 341 U.S. 470 (1951) ...	20, 23, 24

Page

Constitutional Provisions, Statutes, and Rules

U. S. Const., Art. I, §§ 1, 8 2
U. S. Const., Art. II, § 2 ..... 2, 12
U. S. Const., Art. III, §§ 1, 2 2
U. S. Const., Art. VI 2
U. S. Const., Amend. I 2
U. S. Const., Amend. V 2
Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* 2, 5
International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* 13, 21
International Emergency Economic Powers Act, 50 U.S.C. § 1702(a) 24, 25
Trading with the Enemy Act, Sec. 5(b) 20, 21, 22, 23, 24
3 U.S.C. § 301 2
22 U.S.C. § 1732 2
28 U.S.C. § 1254 2
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1330 5
28 U.S.C. §§ 1330-1332 2
28 U.S.C. § 1331 4
28 U.S.C. § 1391 ..... 2, 5
28 U.S.C. § 1603 5
28 U.S.C. § 1605 5
28 U.S.C. § 1606 ..... 15, 18
28 U.S.C. §§ 1609-1611 18
28 U.S.C. § 1651 ..... 2, 4

	Page
28 U.S.C. § 2201	4
28 U.S.C. §§ 2201-2202	2
50 U.S.C. § 1631	2
50 U.S.C. App. §§ 1 *et seq.*	20
50 U.S.C. App. § 5(b)(1)	25
50 U.S.C. App. § 7	22
50 U.S.C. App. § 9	22
50 U.S.C. App. § 9(a)	22, 23
50 U.S.C. App. § 34	20, 22, 23
50 U.S.C. App. § 34(a)	23
Fed. R. Civ. P. 12(b)(6)	4
Fed. R. Civ. P. 54	2
Fed. R. Civ. P. 54(b)	5
Fed. R. Civ. P. 56	2
Fed. R. Civ. P. 62(c)	9
Fed. R. Civ. P. 64	2, 5
Fed. R. Civ. P. 69	2
Rules of United States Supreme Court, Rule 18	10

Executive Orders, Regulations, and Executive Agreements

Exec. Order No. 12,279	7, 8, 12
Exec. Order No. 12,279-12,281	2
Exec. Order No. 12,280	7, 8
Exec. Order No. 12,281	7, 8
Exec. Order No. 12,294	2, 8, 20
Iranian Assets Control Regulations, 31 C.F.R. Part 535	2, 3
31 C.F.R. § 535.213 (46 Fed. Reg. 26,447, as amended by 46 Fed. Reg. ____)	3

Page

31 C.F.R. § 535.214 (46 Fed. Reg. 26,447, as amended by 46 Fed. Reg. ____) 3

31 C.F.R. § 535.215 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. 26,447) 3

31 C.F.R. § 535.218 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. ____) 3

31 C.F.R. § 535.219 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. ____) 3

31 C.F.R. § 535.221 (46 Fed. Reg. 14,335, as amended by 46 Fed. Reg. ____) 3

31 C.F.R. § 535.222 (46 Fed. Reg. 14,335) 3

31 C.F.R. § 535.504 (46 Fed. Reg. 14,336, as amended by 46 Fed. Reg. 26,447) 3

31 C.F.R. § 535.579 (46 Fed. Reg. 14,336) 3

International Agreements

Settlement of Claims of U.S. Nationals, 1960, Poland-U.S., 11 U.S.T. 1953, T.I.A.S. No. 4545 16

Settlement of Claims, 1973, Hungary-U.S., 24 U.S.T. 522, T.I.A.S. No. 7569 16

Claims of U.S. Nationals, 1976, Egypt-U.S., 27 U.S.T. 4214, T.I.A.S. No. 8446 16

Settlement of Claims, 1979, People's Republic of China-U.S., 30 U.S.T. 1957, T.I.A.S. No. 9306 .. 16

Miscellaneous

95 Congressional Record, 8833, 8837-8838 (1949) ... 16

H.R. Rep. No. 459, 95th Cong., 1st Sess. 7 (1977) 21, 24, 25

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7-9, 26-27, reprinted (1976) U.S. Code Cong. & Ad. News 6605, 6605-07, 6611, 6625-26 ..... 15, 18

Page

Lillich, The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump-Sum Agreement, 69 Am. J. Int'l. L. 837, 845 (1975) 16

Regulations in Publication

Treasury Department Release of June 4, 1981 Setting Forth Further Amendments to Iranian Assets Control Regulations, 31 C.F.R. Part 535 3

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

The Petitioner, Dames & Moore, respectfully prays that a writ of certiorari issue to review before judgment the case of *Dames & Moore, Appellant, v. Donald T. Regan, The Secretary of the Treasury of the United States of America, and The United States of America, Appellees,* now in the United States Court of Appeals for the Ninth Circuit, Case No. 81-5450.

Opinions Below.

The Order of the United States District Court for the Central District of California sought to be reviewed is unreported. It is set out in the Appendix to this Petition (the "Appendix") at A-106. No opinion was issued by the Dis-

trict Court, but a Memorandum relating to the District Court's Order was issued. That Memorandum is set out in the Appendix at A-161. No judgment or opinion has been issued by the Court of Appeals.

Jurisdiction.

The Order sought to be reviewed is an order of the United States District Court for the Central District of California filed May 28, 1981, entered June 2, 1981, in the action known as *Dames & Moore v. Donald T. Regan*, United States District Court for the Central District of California, No. CV 81-2064 LEW (Px) (the "Action Below"). Notice of Appeal from that Order to the United States Court of Appeals for the Ninth Circuit was filed in the District Court on June 3, 1981 (Appendix at A-163), and the appeal was docketed in the Court of Appeals on June 4, 1981, as *Dames & Moore v. Donald T. Regan*, No. 81-5450. (Appendix at A-162.) Jurisdiction is conferred on this Court to review the appeal now pending in the United States Court of Appeals for the Ninth Circuit, prior to judgment, under 28 U.S.C. Section 1254(1).

Constitutional Provisions, Statutes, Executive Agreements, Executive Orders, and Regulations Involved.

This case involves the following constitutional provisions, statutes, executive agreements, executive orders, and regulations: U.S. Const. art. I, §§ 1, 8, art. II, § 2, art. III, §§ 1, 2, art. IV, amend. I, amend. V; Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.*; International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, *et seq.*; 3 U.S.C. § 301; 22 U.S.C. § 1732; 28 U.S.C. §§ 1254, 1330-1332, 1391, 1651, 2201-2202; 50 U.S.C. § 1631; Fed. R. Civ. P. 54, 56, 64, 69; Executive Orders 12,279-12,281, 12,294; Iranian Assets Control Regulations,

31 C.F.R. Part 535, §§ 535.213 (46 Fed. Reg. 26,447, as amended by 46 Fed. Reg. ...), 535.214 (46 Fed. Reg. 26,477, as amended by 46 Fed. Reg. ...), 535.215 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. 26,477), 535.218 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. 26,447), 535.219 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. ...), 535.221 (46 Fed. Reg. 14,335, as amended by 46 Fed. Reg. ...), 535.222 (46 Fed. Reg. 14,335), 535.504 (46 Fed. Reg. 14,336, as amended by 46 Fed. Reg. 26,477), 535.579 (46 Fed. Reg. 14,336); Treasury Department Release of June 4, 1981, setting forth amendments, in publication, of the Iranian Assets Control Regulations, 31 C.F.R. Part 535; the Declaration of the Government of the Democratic and Popular Republic of Algeria; and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran. The pertinent texts of the foregoing are set forth in the Appendix.

Statement of the Case.

On April 28, 1981, Petitioner filed the Action Below, in the United States District Court for the Central District of California, for injunctive and declaratory relief against The Secretary of the Treasury of the United States and The United States (hereinafter jointly referred to as the "Government"), seeking (1) a preliminary and permanent injunction enjoining the Government from interference with proceedings in, or related to, an action by Petitioner in the same court known as *Dames & Moore v. Atomic Energy Organization of Iran*, United States District Court for the Central District of California, No. CV 79-04918 LEW (Px) (hereinafter the "Underlying Action"), and (2) a declaratory judgment that the so-called "Algerian Declara-

tions," and the executive orders and regulations purporting to implement said Declarations, to the extent that they purported to authorize such interference in the Underlying Action, were beyond the constitutional and statutory powers of the President and therefore void. The Complaint in the Action Below is set out in full in the Appendix at A-1. Jurisdiction was invoked under 28 U.S.C. Sections 1331, 1651, and 2201. Concurrently with the filing of the Complaint, Petitioner moved for a preliminary injunction on its claim for injunctive relief.

On May 12, 1981, the Government cross-moved to dismiss Petitioner's Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted upon the ground that the Presidential acts in issue were within the President's constitutional and statutory powers. Copies of the Government's motion and supporting memorandum are set forth in the Appendix at A-88 and A-90, respectively.

The cross-motions of the parties were disposed of by the District Court in a consolidated Order, filed May 28, 1981, entered June 2, 1981, involving three other actions. (Appendix at A-106.) In its Order, the District Court denied Petitioner's motion for a preliminary injunction and granted the Government's motion to dismiss for failure to state a claim upon which relief may be granted. The District Court based its rulings on the arguments made by the Government in its motion to dismiss and supporting memorandum. (Appendix at A-161.) It is from these rulings of the District Court that Petitioner has appealed to the Court of Appeals; and it is that appeal which Petitioner asks this Court to accept for review.

Petitioner's verified Complaint in the Action Below alleged as part of its factual basis certain salient facts concerning the Underlying Action. That suit, to collect approximately $3,500,000 in unpaid invoices, had been filed

by Petitioner on December 19, 1979, against the Atomic Energy Organization of Iran (the "AEOI"), the State and Government of Iran ("Iran"), and some twenty-eight Iranian banks that had been nationalized during the Iranian revolution (the "Bank Defendants"). Personal jurisdiction over the defendants, subject matter jurisdiction, and venue in the Underlying Action were based upon 28 U.S.C. Sections 1330 and 1391, and certain provisions of the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), 28 U.S.C. §§ 1602, *et seq.*, specifically 28 U.S.C. Sections 1603 and 1605.

The Complaint in the Action Below further alleged, with respect to the Underlying Action, that on December 20, 1979, January 4, 1980, February 4, 1980, and May 12, 1980, pursuant to Rule 64 of the Federal Rules of Civil Procedure and applicable attachment law of California, the District Court had issued writs of attachment directed against the property of the defendants, that those writs were served on various third parties by the United States Marshal, and that property of certain of the Bank Defendants was thereby attached as security for any ultimate judgment that might be entered.

The Complaint in the Action Below further alleged, with respect to the Underlying Action, that on February 18, 1981, the District Court had entered final judgment in favor of Petitioner against defendants the AEOI and Iran in the amount of $3,788,930.79 plus interest and that the Underlying Action was still pending against the Bank Defendants.[1] The Complaint in the Action Below further alleged that

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[1]A separate final judgment was entered against the AEOI and Iran under the provisions of Rule 54(b) of the Federal Rules of Civil Procedure. On March 20, 1981, the AEOI and Iran noticed an appeal from this judgment but did not at the time seek any stay of execution on the judgment.

efforts to execute on the judgment in the Underlying Action by levying on Iranian property had been commenced by Petitioner in the State of Washington, that in March 1981 the Superior Courts of Clark and Snohomish Counties, State of Washington, had issued writs of execution and garnishment in enforcement of that judgment, and that a sheriff's execution sale of certain Iranian property had been noticed in Clark County, State of Washington.

The Complaint in the Action Below went on to set forth various acts of the President in interference with Petitioner's Underlying Action and Petitioner's attachments, judgment, and judgment levies. These Presidential acts arose out of President Carter's resolution of the 14-month-old hostage crisis with Iran. During the time in which Americans were held hostage, the United States had engaged in a long series of public and nonpublic efforts to secure the release of the hostages, including various negotiations, a proceeding before the International Court of Justice (whose ruling Iran ignored), and an aborted military effort. Finally, on January 19, 1981, President Carter, in his last days of office, entered into two so-called "Algerian Declarations" with the Iranian Government in order to secure the release of the hostages.

Under the Algerian Declarations, President Carter agreed that, in return for Iran's releasing American hostages, the President would undertake, *inter alia*, to terminate all lawsuits of American citizens pending in the United States against Iran and its agencies and controlled entities, nullify all attachments and judgment levies issued by United States courts against Iranian property, and transfer out of the country all Iranian property here (estimated at $4,000,000,000), notwithstanding present or future attachment liens or judgment levies against those assets. At the time, several hundred lawsuits against Iranian defendants, of which

Petitioner's Underlying Action was typical, were pending in courts around the United States.

As part of the Algerian Declarations, the President and Iran agreed to set up an Arbitral Tribunal, to be funded initially with $1,000,000,000 of Iranian assets, to which some, but not all, of the current United States plaintiffs might present their claims. Claims based on contracts with certain forum selection clauses favoring Iran would not be within the Tribunal's jurisdiction. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Art. II, reprinted in the Appendix at A-30.[2] It has been estimated that claims eligible for the Tribunal aggregate $3,000,000,000 to $4,000,000,000. Whether the Tribunal will function at all, when (if ever) it will complete its work, and whether it will be funded by Iran beyond the initial $1,000,000,000 are all uncertain at this time.

On the morning of January 20, 1981, President Carter issued a series of executive orders implementing the Algerian Declarations. Among these orders, Executive Order Nos. 12,279, 12,280, and 12,281 purport to nullify attachments on all Iranian property remaining in this country. (Appendix at A-43.) Executive Order Nos. 12,279 and

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[2]The Complaint in the Action Below alleged that the contract in the Underlying Action provides:

> Any dispute or disagreement arising under this Contract shall first be discussed amicably by both parties. Failing agreement, such dispute or disagreement shall be submitted to conciliation. Each party shall have the right to appoint one conciliator and a third conciliator shall be appointed by the Plan and Budget Organization of the Government of Iran. In the event that either party is unwilling to accept the decision of the conciliation board, the matter shall be decided finally by resort to the courts of Iran.

12,280 order persons holding funds or securities of Iran or its agencies, instrumentalities, or controlled entities, to transfer such property to the Federal Reserve Bank of New York. New regulations under these executive orders require such transfer under pain of criminal penalties by noon on June 19, 1981. In addition, Executive Order No. 12,281 orders persons holding Iranian property other than funds or securities to transfer the same as directed by Iran. Such direction could presumably come from Iran at any time.

Executive Order Nos. 12,279, 12,280, and 12,281 further purport to grant a "full acquittance" to persons who transfer Iranian property in compliance with those orders and in violation of judicial orders or other court processes. In addition, these executive orders purport to prohibit United States litigants from acquiring new interests in Iranian property now in the United States. Thus, any United States litigant (such as Petitioner) obtaining a judgment from a United States court is prohibited from levying that judgment against any Iranian property now in the United States.

On February 24, 1981, after entry of final judgment against the AEOI and Iran in Petitioner's Underlying Action, President Reagan, who had inherited the Algerian Declarations from President Carter, issued Executive Order No. 12,294 which purported to "suspend" all claims of United States citizens, pending in court or otherwise, "which may be presented to the Iran-United States Claims Tribunal . . . ." (Appendix at A-52.) The "suspension" becomes a "discharge" unless the Tribunal finds that it has no jurisdiction or Iran fails to pay any award made by the Tribunal. Also on February 24, 1981, the Department of the Treasury released elaborate regulations implementing the various executive orders. (*See* Appendix at A-55 through A-86.)

Because these various Presidental acts were interfering with Petitioner's prosecution of the Underlying Action, including Petitioner's attachments, judgment, and judgment levies, Petitioner filed the Action Below to enjoin the Government and obtain a judicial declaration of Petitioner's rights. On the facts alleged in Petitioner's verified Complaint and the motions and briefs of the parties, the District Court issued its Order of May 28, 1981 in the Action Below denying Petitioner preliminary injunctive relief and dismissing Petitioner's Complaint for failing to state a claim for relief.[3] After Petitioner noticed and docketed its appeal from these rulings, Petitioner moved under Federal Rules of Civil Procedure Rule 62(c) to enjoin the Government, pending appeal, from transferring, or requiring others to transfer, Iranian property subject to Petitioner's attachments and judgment levies. That motion was granted and an injunction pending appeal issued on June 8, 1981. (Appendix at A-167.) Petitioner now asks this Court to review its appeal prior to judgment by the Court of Appeals.

Reasons for Seeking Review Before Judgment by the Court of Appeals.

A Petition for a Writ of Certiorari to review a case pending in the Court of Appeals before judgment will be granted by this Court "only upon a showing that the case is of such imperative public importance as to justify the deviation from

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[3]Based upon the Court's conclusions reached in the Action Below, the District Court concurrently granted a motion by the Government to stay the judgment previously entered in the Underlying Action on February 18, 1981, stayed further proceedings in the Underlying Action (still pending against the Bank Defendants), and vacated all attachments in the Underlying Action but stayed its order vacating attachments until July 19, 1981. (Appendix at A-106.) By order filed and entered June 8, 1981, in the Underlying Action, the District Court specified that its stay of Petitioner's judgment was only a stay of execution pending appeal.

normal appellate practice and to require immediate settlement in this Court." U.S. Sup. Ct. R. 18.

As set forth in the following section of this Petition, the issues raised here involve novel, fundamental questions of law going to the core of the government that our Constitution creates — its allocation and separation of powers among the executive, legislative, and judicial branches. Billions of dollars, as well as delicate constitutional principles, are at stake. This is a case of imperative public importance.

If the Court is to accept an Iranian case for review, it must do so now, without awaiting a judgment from the Court of Appeals. For, in the absence of this Court's accepting an Iranian case for review, the Government will require all persons holding Iranian funds and securities to transfer those funds and securities to the Federal Reserve Bank in New York by 12:00 noon on June 19, 1981 under pain of criminal penalties. Moreover, unless the Court accepts an Iranian case for review, the Government apparently intends to transfer all Iranian funds and securities out of the country, and out of the reach of United States court process entirely, by July 19, 1981, thus rendering major issues presented in the Iranian cases academic, if not moot.[4]

Reasons for Granting the Writ.

In service to the obviously praiseworthy objective of obtaining the release of American citizens held hostage by Iran, President Carter in his last days in office used legal rights and property interests of American citizens as bargaining chips in negotiating an executive agreement with

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[4]As of this writing, the Government has been enjoined by the District Court pending appeal from transferring, or requiring others to transfer, Iranian property attached or levied on by Petitioner. Whether the Government will seek review of that injunction in the Court of Appeals or in this Court is not known by Petitioner.

a foreign power. The agreement made by the President severely and adversely affects those private rights and interests. Statutory rights to have claims heard in American courts with their procedural safeguards are forfeited. Attachments of assets to secure final satisfaction of judgments are abrogated. Judicial determinations previously obtained in American courts — including, in Petitioner's case, a federal district court judgment — are wiped out. And an unknown number of Americans — Petitioner possibly among them — do not even receive in return the uncertain value of asserting their claims before the Arbitral Tribunal. Petitioner stands to lose a judgment against two parties, levies on Iranian property in enforcement of that judgment, and several attachments against property of the other parties against whom the Underlying Action is still pending.

While there are a variety of subsidiary questions raised by the President's actions here, the core issues are these: Does the President in conducting foreign affairs have inherent constitutional authority to commandeer and forfeit legal rights and property interests of private citizens when he deems it to be in the interest of broader foreign policy objectives? If not, does any statute confer such authority on the President? Everyone would agree that the President had no unilateral authority to order payment of money to Iran from the United States Treasury in order to secure the hostages' release. Did he nevertheless have authority to direct a similar result by bargaining away legal rights and property interests of private American citizens?

When President Truman, in service to the no less praiseworthy objective of protecting the Nation's defense capability in a time of armed conflict, ordered the temporary seizure of the American steel industry, this Court determined that such action was constitutionally invalid in the absence of congressional approval. *See Youngstown Sheet & Tube*

Co. v. Sawyer, 343 U.S. 579 (1952). No such authority to deal with the rights and property interests of American citizens was found inherent in the President's explicit constitutional powers as Commander-in-Chief. *See* U.S. Const. art. II, § 2. In part, the instant case presents similar issues regarding the inherent powers of the President to conduct foreign affairs. In another respect, however, this case presents issues beyond *Youngstown* because an integral aspect of the exercise of executive power undertaken here effectively abrogates judicial proceedings and orders authorized by Congress.[5]

In justification of the President's actions, the Government has asserted two primary propositions. First, the Government contends that the President has the inherent power under Article II of the Constitution to "settle" (or to enact a "new rule of law" to govern) any and all claims by American citizens against foreign states, agencies or controlled entities — that is to say, the claims of Americans against foreign countries and agencies are the property of the President to do with as he will in the conduct of foreign policy. From this extreme proposition the Government argues, not entirely without logic, that if the President can treat such claims as his own, he can take the various steps that he took here.

The Government's second proposition is that, in addition to the purported unlimited power of the Executive to settle

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[5]As a dramatic illustration of the clash of authority between the coordinate branches of the federal government, the executive orders in issue purport to immunize from sanction individual actions undertaken in compliance therewith, nowithstanding that such action may be in violation of court order. Indeed, the Executive Branch has threatened individuals with civil and criminal sanctions for noncompliance with these executive orders even though they require acts in violation of court orders. *Compare, e.g.*, Exec. Order No. 12,279, 46 Fed. Reg. 7,919 (1981) (reprinted in Appendix at A-43) *with* Treasury Department Release of June 4, 1981 (reprinted in Appendix at A-151).

claims of Americans against foreign countries and agencies, he is authorized by the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, *et seq.* (''IEEPA''), to abrogate the rights of American citizens under writs of attachment and execution against Iranian property securing satisfaction of judgments that Americans obtain on their claims and to remove such property from the United States for the benefit of the foreign country, notwithstanding judicial attachments and judgment levies to the contrary. Thus, the Government argues secondarily that, apart from any inherent constitutional authority to ''settle'' Americans' claims against foreign countries and agencies, Congress has authorized the President to render those claims largely academic by removing from this country the property of foreign countries and agencies subject to judicial liens. This interpretation of IEEPA, Petitioner submits, stands the statute on its head by treating a statute expressly designed to limit Presidential power to be one that greatly expands it.[6]

The Government bases its sweeping proposition regarding the Executive's inherent authority to dispose of, or ''settle,'' the legal claims of American citizens on an alleged long line of precedent. But analysis of the Government's cases reveals that there is no decision of this Court — nor any established body of decisional law in lower federal courts — that even remotely supports the actions taken by the President in this case as being within his inherent constitutional authority. The Government's argument rests upon citation of, and selective quotation from, cases and sec-

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[6]The Government's arguments have met with success in *American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779 (D.C. Cir., decided May 22, 1981), and *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir., decided May 22, 1981). But, for the reasons herein outlined, Petitioner submits that those cases have been wrongly decided and should not stand.

ondary authorities that are largely or entirely inapplicable — they concern statutes not involved here or address factual circumstances and legal contexts far different from those now presented.

For instance, neither *United States v. Pink*, 315 U.S. 203 (1942), nor *United States v. Belmont*, 301 U.S. 324 (1937), involved interference with claims of United States citizens, whether pending before a court or not; indeed, both cases upheld the ability of the United States, as the assignee under the Litvinov Assignment, to marshal local assets for the benefit of local creditors before the claims of alien creditors were realized. The goal of the Executive in these cases was to maximize the ability of United States citizens to recover claims against the foreign state. Moreover, the issue before the Court in both *Pink* and *Belmont* was not the Executive's authority to settle the claims of United States citizens, but rather the scope of executive power to recognize foreign regimes and decrees and the effect of the exercise of such power, under the Supremacy Clause, on inconsistent provisions of state law.

The decision in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), adds little to the discussion of the Executive's unilateral authority to settle pending domestic commercial claims against foreign states. There the Court found that an intervening treaty, representing the judgment of two coordinate branches of government, defeated the wartime claims of the United States and the prize rights of the men of a "public armed vessel" of the United States. *Id.* at 103-09. Moreover, the validity of the treaty was not

at issue. *Id.* at 109. Accordingly, *Schooner Peggy* is largely irrelevant here.[7]

In addition to *Pink*, *Belmont*, and *Schooner Peggy*, the Government, in support of the purported authority to settle these claims, adverts to an alleged historical practice of executive agreements of the kind involved here and alleged congressional acquiescence in that practice. This contention is fundamentally flawed because claims settled under past executive practice were plainly dissimilar to those at issue here and, in any event, largely unenforceable by United States claimants in the courts of this country.

Historically, claims of American nationals against a foreign state or its agencies were necessarily resolved, if at all, by the Executive Branch through agreement with the foreign power because the claimant, under the absolute theory of sovereign immunity, had no enforceable remedy in United States courts.[8] Even after judicial recognition of the restrictive theory of sovereign immunity, whether the foreign power could be sued rested on the discretion of the Executive.[9] Even if suit was allowed, execution on property of

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[7]*Schooner Peggy* is cited by the Government in support of its contention that the Algerian Declarations created a "new rule of substantive law." The Government adopted this argument in rejoinder to contentions by United States claimants that the Declarations had divested Article III courts of jurisdiction vested in them by Congress under the FSIA. However, Petitioner questions what new rule of substantive law has been created by the Executive? The law of contracts on which Petitioner's Underlying Action is based was not altered. The only possible "rule of law" that has been altered by the Executive is the FSIA which expressly states that all foreign states not immune from suit "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. By attempting to change the provisions of a federal statute, the Executive's action presents serious constitutional issues concerning the separation of powers between the Executive, Congress and the Judiciary.

[8]*See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7-9, 26-27, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6605-07, 6625-26 ("FSIA Report").

[9]*See id.*

foreign powers in this country was not available.[10] Quite understandably, therefore, claims against foreign countries came to be regarded as those that the President could settle in his own discretion because their resolution and satisfaction depended solely on the Executive's ability to negotiate with the foreign power and its willingness to do so in a given case or class of cases. It followed that claimants were viewed as beneficiaries of the various settlement agreements made by the Executive.[11]

Moreover, many of the prior settlement agreements involve claims much different from those now cognizable in the courts and enforceable without executive aid; for example, foreign nationalizations and expropriations,[12] and war claims and other losses[13] for which recovery by United States claimants, without executive intervention, was, and still is, largely unavailable. In contradistinction to these types of claims, however, Petitioner's case involves a com-

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[10]*See id.*

[11]*See* Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump-Sum Agreement*, 69 Am. J. Int'l. L. 837, 845 (1975).

[12]Settlement of Claims, 1979, People's Republic of China-U.S., 30 U.S.T. 1957, T.I.A.S. No. 9306 (final settlement of "the claims of the USA and its nationals . . . against the PRC arising from any nationalization, expropriation, intervention, and other taking of, or special measures directed against, property of nationals of the USA," Art. I(a)); Claims of U.S. Nationals, 1976, Egypt-U.S., 27 U.S.T. 4214, T.I.A.S. No. 8446 (lump sum settlement for "nationalization or expropriation," Art. II); Settlement of Claims, 1973, Hungary-U.S., 24 U.S.T. 522, T.I.A.S. No. 7569 (settlement of claims arising from debts, nationalization and other takings); Settlement of Claims of U.S. Nationals, 1960, Poland-U.S., 11 U.S.T. 1953, T.I.A.S. No. 4545 (settlement of claims for nationalization, expropriations, debts owed by nationalized industries). *See also* 95 Cong. Rec. 8833, 8837-8838 (1949) (discussion of settlement between United States and Yugoslavia: claims settled by lump sum agreement were "American claims for property nationalized or otherwise taken over in Yugoslavia").

[13]*See Z. & F. Assets Realization Corp. v. Hull*, 311 U.S. 470 (1941) (reimbursement of sabotage losses).

mercial dispute, presently enforceable in United States courts, which is not dependent for satisfaction on the will of the Executive.[14]

In sum, the Government is unable to demonstrate legal support — either in the form of judicial precedent or a consistent and relevant pattern of prior executive action — for its contention that the Executive has inherent constitutional authority to settle or dispose of legal claims adversely to the interests of United States citizens in circumstances where the claimant has available a judicially-enforceable right and an effective remedy. Also significant, the Government has not shown support for any inherent power to settle a claim actually pending before an Article III court. Finally, almost all of the Government's judicial authorities predate the enactment of the FSIA. Whatever inherent constitutional authority to settle private claims against foreign governments the President might have in the absence of legislative action in the field, the extent of that authority today must be judged with reference to the legislative directives codified in the FSIA.

With the enactment of the FSIA, the rights of United States claimants to litigate international commercial disputes

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[14]Thus, in circumstances such as the instant case, where Petitioner has a judicially enforceable remedy and an effective means to secure satisfaction of judgment, the authorities relied on by the Government noting an "unreviewable discretion" in the Executive whether to commit a claim to a settlement agreement are irrelevant: *Miller v. United States*, 583 F.2d 857 (6th Cir. 1978) (government discretion to present private taking claim to Canada under the Boundary Waters Treaty of 1909); *United States ex rel. Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir. 1954) (denial of petition for writ of habeas corpus, or, alternatively, mandamus to compel the Secretary of State, under the status of Armed Forces Treaty, to negotiate with France for the release of an American serviceman imprisoned in France for a criminal offense), *cert. denied*, 348 U.S. 952 (1955); *United States v. La Abra Silver Mining Co.*, 29 Ct. Cl. 432, 512-13 (1894) (executive discretion to determine whether claim is meritorious before demanding settlement with foreign state).

against foreign states and their agencies and instrumentalities changed dramatically. Rather than mere beneficiaries of the Executive's willingness and ability to negotiate settlements, United States claimants, under the FSIA, are now able to pursue and enforce their claims against foreign states in United States courts. Furthermore, Congress in the context of international commercial claims, expressly intended that private claimants should no longer be beholden to the Executive's political and diplomatic decisions. Thus Congress expressly provided jurisdiction over commercial claims against foreign states to ensure that a foreign state or entity not immune from suit "shall be liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 1606, and that, in appropriate circumstances, assets of the foreign government or its entities within the jurisdiction of United States courts are available for execution of judgment. *Id.* §§ 1606, 1609-1611.

Although there is little indication that Congress considered emergencies such as the Iranian hostage crisis when it enacted the FSIA, it is very clear that Congress did intend to benefit private American claimants by depoliticizing the resolution of commercial disputes and committing them exclusively to the jurisdiction of the courts.[15] Exercising its powers over foreign commerce and the jurisdiction of the lower federal courts,[16] Congress removed from the Executive's authority over foreign affairs the power he previously exercised to determine, on a case-by-case basis and in light of foreign policy objectives, the amenability of foreign sovereigns to suit in the courts of the United States.

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[15]FSIA Report, *supra*, at 6606-07.
[16]*Id.* at 6611.

Because Congress, in the FSIA, has indeed expressed dissatisfaction with executive intervention in private commercial disputes involving foreign states, and, in another recent statute, the IEEPA, discussed *infra*, has curtailed executive control over foreign property, notwithstanding national emergencies, the test to be applied to the executive actions at issue here is the third and most restrictive standard of review espoused in Justice Jackson's *Youngstown* concurrence: "[C]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject . . . . leav[ing] presidential power most vulnerable to attack and in the least favorable of possible constitutional postures." 343 U.S. at 637-40 (Jackson, J., concurring).[17]

In addition to its contentions concerning the President's inherent constitutional power, the Government contends that certain of President Carter's actions are authorized by statute — specifically by IEEPA. The Government points to this statute as authority for the President's ordering all Iranian property released from judicial attachments and judgment levies and transferring all such property, even property se-

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[17]If, as the Government has argued below, the President has essentially unlimited power in conducting foreign affairs to use and dispose of as he will claims or judgments of United States citizens against foreign governments and their agencies, the possible abuses of such a power by future Presidents, however well intentioned, are many and grave. For example, under the "conducting foreign affairs" rationale the Government proffers, there exists no meaningful distinction between "settlement" of American claims against foreign governments and their agencies and "settlement" of claims by foreign governments and their agencies against Americans, as by Executive waiver of defenses or confession of judgments. *Cf. Youngstown*, 343 U.S. at 642 (Jackson, J., concurring) ("But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture").

curing claims which were not "settled" by the President,[18] out of the country and out of the reach of United States courts.[19]

Prior to 1977, the President's statutory powers to react to peacetime, international emergencies derived from Section 5(b) of the Trading with the Enemy Act ("TWEA"), 50 U.S.C. App. §§ 1, *et seq.* TWEA conferred upon the President a broad variety of powers designed to prevent the transfer of foreign-held assets in the United States to hostile foreign nations and to secure those assets for the benefit of American creditors. *See Zittman v. McGrath*, 341 U.S. 470, 473-74 (1951); *Propper v. Clark*, 337 U.S. 472, 481, 484 (1949). A subsidiary purpose was to provide for a fair method of distribution of foreign assets among American creditors when such assets were inadequate to satisfy fully all outstanding American claims. *See* 50 U.S.C. App. § 34; *Zittman v. McGrath*, 341 U.S. at 473-74.

In enacting IEEPA, Congress determined that the Executive's broad wartime powers under TWEA were inap-

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[18]Under the Algerian Declarations, American claimants with certain forum selection clauses have not had their claims "settled." The United States contends that these claimants may continue to litigate in United States courts but their attachments or other judicial liens are vacated. Executive Order No. 12,294, reprinted in Appendix at A-52.

[19]That contention raises serious constitutional questions with respect to Executive Branch interference with proceedings before, and nullification of orders of, an Article III court. *See Electronic Data Systems Corporation Iran v. Social Security Organization of the Government of Iran*, 508 F. Supp. 1350 (N.D. Tex.), *petition for writ of cert. filed*, No. 80-2035 (1981). These constitutional problems are discussed in the petition for writ of certiorari filed by Electronic Data Systems, No. 80-2035, and are not further discussed here.

propriate in peacetime emergencies. Congress observed that TWEA had become "essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review." H.R. Rep. No. 459, 95th Cong., 1st Sess. 7 (1977) ("IEEPA House Report"). To limit the breadth of executive authority, IEEPA substituted a "new set of international economic powers, *more restricted than those available during time of war . . . .*" *Id.* at 10 (emphasis added).

IEEPA authorizes the President to regulate international economic transactions when this country is confronted with a declared national emergency arising from "any unusual or extraordinary threat [from exterior forces] . . . to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a). The Government contends that the "asset release and transfer" order in issue here is authorized by Section 1702(a), which provides that upon declaration of a national emergency, the President may:

> [I]nvestigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.

Id. § 1702(a)(1)(B).

This language, taken nearly verbatim from Section 5(b) of TWEA, is sweeping in breadth — which is unexceptional in light of its original purpose in TWEA: to grant to the President all possible authority to keep assets out of the hands of hostile foreign nations during a war. There is, however, at least one obvious limit to Section 1702(a) of IEEPA; it cannot sensibly be understood to authorize the

Executive to do what he could not do under Section 5(b) of TWEA, from which it is derived.

Under TWEA, the President possesses authority not only temporarily to freeze or block the transfer of foreign-owned assets in the United States, but also summarily to seize such assets, 50 U.S.C. App. § 7, and vest title to them in the United States. *Id.* § 5(b). Despite this more expansive authority, however, the President could not agree to immunize foreign assets from judicial attachment and levy to the detriment of American claimants and creditors and order those assets transferred beyond the jurisdiction of the United States to the benefit of the foreign debtor. Under TWEA, American creditors of foreign nationals (and, following enactment of the FSIA, foreign governments and their agencies) whose assets are held or vested by the Executive are entitled to file with the Executive their claims against the foreign debtor and to be paid out of those assets or their proceeds. *Id.* §§ 9, 34.[20] The protection and satisfaction of

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[20]Section 9(a) provides that:

> Any person not an enemy . . . to whom any debt may be owing from an enemy . . . whose property . . . shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said Custodian a notice of his claim . . .; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held . . . or of the interest therein to which the President shall determine said claimant is entitled . . . . *If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice . . . required and shall have made no application to the President, said claimant may institute a suit in [federal court] . . . to establish the . . . debt so claimed, and if so established the court shall order the payment,* conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the Court shall determine said claimant is entitled . . . .

the claims of American creditors was a major legislative purpose of TWEA. *See Zittman v. McGrath*, 341 U.S. at 473-474; *Propper v. Clark*, 337 U.S. at 484. This Court's discussion in *Zittman* of the relationship between Section 5(b) of TWEA and the statutory protections that TWEA provides for the claims of American creditors refutes any contention that the President under TWEA has any authority to immunize otherwise attachable and executable foreign assets to the prejudice of American creditors and direct them transferred beyond this country's jurisdiction:

> While the statute under which the funds are to be "held, administered and accounted for" authorizes the vesting of . . . foreign-owned property in the Custodian and its administration "in the interest of and for the benefit of the United States," *it is not for a confiscation measure, but a liquidation measure for the protection of American creditors*. [TWEA, § 5(b).] It [§ 34] provides for the filing and proving of claims and states that the funds "shall be equitably applied" for the payment of debts. If the Custodian disallows a claim, or if he disallows a claim of priority where claims exceed assets, the claimant may seek relief in [federal court]. The transfer of possession of these funds does not purport to work any automatic depri-

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50 U.S.C. App. § 9(a) (emphasis added).

Section 34(a) provides that:

> Any property or interest vested in or transferred to the Alien Property Custodian . . . *shall be* equitably applied by the Custodian . . . *to the payment of debts owed* by the person who owned such property or interest immediately prior to its vesting in or transfer . . . .

Id. § 34(a) (emphasis added). Section 34 also provides for a claims procedure, for priority and *pro rata* distribution among creditors when assets of the foreign debtor are insufficient to satisfy all valid claims, and for judicial review of administrative denial of claims.

vation of rights of any class of creditors, but takes over the estate for administration.

341 U.S. at 473-74 (emphasis added, footnotes omitted).

The Government's contention that the President's action is authorized by the broad language of IEEPA thus reduces to the absurd proposition that the President has more authority under Section 1702(a) of IEEPA than he has under the identical language of Section 5(b) of TWEA — this notwithstanding the fact that the very reason for enacting IEEPA was to restrict the President's former authority under TWEA. *See* IEEPA House Report, *supra*, at 7. The language of Section 1702(a), like any other word, phrase or section of a statute, draws its meaning from the context of the entire statute and the legislative purposes for which it was enacted.[21] Under TWEA, the same language did not authorize executive action in derogation of the rights and interests of American creditors for the benefit of foreign debtors, and to construe Section 1702(a) to permit such action flies in the face of the very legislative reason for enacting TWEA and IEEPA. By releasing property from Petitioner's attachments and judgment levies and by ordering them "transferred" and "withdrawn" to foreign locations, the Executive neither keeps the assets out of the control of a hostile foreign power nor secures them for the benefit of American creditors. Rather, the Executive effectuates the contrary and perverse result of defeating legal

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[21]This Court has cautioned against overly literal interpretations of TWEA's language:

> The concern of the Trading With the Enemy Act is with problems at once complicated and far-reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes.

Guessefeldt v. McGrath, 342 U.S. 308, 319 (1952).

rights and property interests of American creditors to the benefit of the foreign government.

Moreover, IEEPA specifically revoked the Executive's power under TWEA to "seize" and "vest" foreign assets. *Compare* 50 U.S.C. App. § 5(b)(1) *with* 50 U.S.C. § 1702(a). The House Report emphasizes that IEEPA removes the authority of the President in time of national emergency short of war to "vest any property or interest of any foreign country . . . and to hold, use, administer, sell, or otherwise deal with 'such interest or property' in the interest of and for the benefit of the United States." IEEPA House Report, *supra*, at 2. It seems most unlikely that Congress intended to authorize the Executive to give away foreign assets securing claims of United States creditors in the very statute enacted to prohibit him from seizing the same assets to benefit United States creditors.

Conclusion.

For the foregoing reasons, a Writ of Certiorari to the Court of Appeals for the Ninth Circuit before judgment should be granted, and the Order of the District Court filed May 28, 1981, entered June 2, 1981, should be reversed.

Dated: June 10, 1981.

Respectfully submitted,

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No. .....

IN THE

Supreme Court of the United States

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT.

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TABLE OF CONTENTS

Page

Complaint, Motion to Dismiss, Government's Memorandum, Orders and Other Proceedings Below ..... A- 1

Complaint for Injunctive and Declaratory Relief, filed on April 28, 1981 in the United States District Court for the Central District of California A- 1

Exhibits to Complaint for Injunctive and Declaratory Relief, filed on April 28, 1981 in the United States District Court for the Central District of California, as follows:

Exhibit A: Judgment Against Defendants Atomic Energy Organization of Iran and State and Government of Iran in *Dames & Moore v. Atomic Energy Organization of Iran, et al.*, No. CV 79-04918 LEW (Px), filed and entered on February 18, 1981 by the United States District Court for the Central District of California ..... A- 13

Exhibit B: Writ of Garnishment in *Dames & Moore v. Atomic Energy Organization of Iran, et al.*, defendants, and *The Boeing Company and Boeing Domestic Sales Corporation*, garnishee, Cause No. 81-2-00665-3, issued on March 2, 1981 by the Superior Court of Washington for Snohomish County ..... A- 15

Exhibit C: Writ of Execution in *Dames & Moore v. Atomic Energy Organization of Iran, State and Government of Iran, et al.*, No. 81-2-00290-4, issued on March 5, 1981 by the Superior Court of Washington for Clark County; Notice of Sheriff's Sale of Personal Property, issued on March 5, 1981 ..... A- 17

Page

Exhibit D: Declaration of the Government of the Democratic and Popular Republic of Algeria and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ..... A- 21

Exhibit E: Executive Orders 12277-12281 ... A- 36

Exhibit F: Executive Order 12294 ..... A- 52

Exhibit G: February 26, 1981 Amendments to Iranian Assets Control Regulations, 31 C.F.R. Part 535 ..... A- 55

Motion to Dismiss Dames & Moore's Complaint for Failure to State a Claim Upon Which Relief May be Granted ..... A- 88

Memorandum in Support of Defendants' Motion to Dismiss and in Opposition to Dames & Moore's Brief as Amicus Curiae ..... A- 90

Order of the United States District Court for the Central District of California, filed May 28, 1981, entered June 2, 1981 ..... A-106

Memorandum of United States District Court for the Central District of California, filed and entered June 8, 1981 ..... A-161

Docket Fee Payment Notification Form of the United States Court of Appeals for the Ninth Circuit, filed June 4, 1981 ..... A-162

Notice of Appeal, filed and entered June 3, 1981 A-163

Order of the United States District Court for the Central District of California, filed and entered June 8, 1981 ..... A-167

TABLE OF AUTHORITIES

Constitutional Provisions, Statutes, and Rules

	Page
U. S. Const., Art. I, §§ 1, 8	A-108
U. S. Const., Art. II, § 2	A-108
U. S. Const., Art. III, §§ 1, 2	A-108
U. S. Const., Art. VI	A-109
U. S. Const., Amend. I	A-109
U. S. Const., Amend. V	A-110
Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*	A-111
International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.*	A-122
3 U.S.C. § 301	A-128
22 U.S.C. § 1732	A-129
28 U.S.C. § 1254	A-130
28 U.S.C. § 1330	A-131
28 U.S.C. § 1331	A-132
28 U.S.C. § 1332	A-133
28 U.S.C. § 1391	A-135
28 U.S.C. § 1651	A-137
28 U.S.C. §§ 2201-2202	A-138
50 U.S.C. § 1631	A-139
Fed. R. Civ. P. 54	A-140
Fed. R. Civ. P. 56	A-142
Fed. R. Civ. P. 64	A-145
Fed. R. Civ. P. 69	A-145

Executive Orders, Regulations, and Executive Agreements

Exec. Order No. 12,279 (Exhibit E to Complaint)	A- 43

Page

Exec. Order No. 12,280 (Exhibit E to Complaint) ..... A- 46

Exec. Order No. 12,281 (Exhibit E to Complaint) ..... A- 49

Exec. Order No. 12,294 (Exhibit F to Complaint) ..... A- 52

Iranian Asset Control Regulations, 31 C.F.R. Part 535

31 C.F.R. §535.213 (46 Fed. Reg. 26,447, as amended by 46 Fed. Reg. ____) ..... A- 72

31 C.F.R. § 535.214 (46 Fed. Reg. 26,447, as amended by 46 Fed. Reg. ____) ..... A- 72

31 C.F.R. § 535.215 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. 26,447) ..... A- 73

31 C.F.R. § 535.218 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. ____) ..... A- 74

31 C.F.R. § 535.219 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. ____) ..... A- 75

31 C.F.R. § 535.221 (46 Fed. Reg. 14,335, as amended by 46 Fed. Reg. ____) ..... A- 76

31 C.F.R. § 535.222 (46 Fed. Reg. 14,335) ..... A- 78

31 C.F.R. § 535.504 (46 Fed. Reg. 14,336, as amended by 46 Fed. Reg. 26,447) ..... A- 82

31 C.F.R. § 535.579 (46 Fed. Reg. 14,336) ..... A- 83

Declaration of the Government of the Democratic and Popular Republic of Algeria (Exhibit D to Complaint) ..... A- 21

Page

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Exhibit D to Complaint) ..... A- 30

Regulations in Publication

Treasury Department Release of June 4, 1981 setting forth further amendments to Iranian Assets Control Regulations, 31 C.F.R. Part 535 ..... A-151

No. .....

IN THE

Supreme Court of the United States

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF.

United States District Court, Central District of California.

Dames & Moore, a partnership, Plaintiff, v. Donald T. Regan, The Secretary of The Treasury of the United States of America, and The United States of America, Defendants. Civil Action No. 81 2064.

Filed: April 28, 1981.

Plaintiff Dames & Moore ("Plaintiff") hereby files pursuant to Rule 69 of the Federal Rules of Civil Procedure this complaint in aid of judgment and alleges as follows:

PARTIES

1. Plaintiff is a partnership with its principal place of business in Los Angeles, California.

2. Donald T. Regan is the Secretary of the Treasury of the United States (the "Secretary") and is sued in his official capacity. The Secretary may be served with process herein pursuant to Rule 4(d)(5) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1391(e).

3. The United States of America (the "United States") is the Government established by the Constitution of the United States of America. It may be served with process herein pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.

JURISDICTION AND VENUE

4. This Court has jurisdiction of this proceeding in aid of judgment (a) under 28 U.S.C. § 1331, in that the amount in controversy herein exceeds $10,000, exclusive of interest and costs, and this action arises under the Constitution, laws or treaties of the United States; (b) under 28 U.S.C. § 1651; (c) under 28 U.S.C. §§ 2201 et seq.; (d) pursuant to Rule 69 of the Federal Rules of Civil Procedure.

5. Venue of this proceeding in aid of judgment is in this District pursuant to 28 U.S.C. § 1391(e)(1).

FACTUAL ALLEGATIONS

6. This court, on February 18, 1981, entered a Final Judgment in action CV 79-04918 LEW (Px), *Dames & Moore v. Atomic Energy Organization of Iran, et al.* (hereinafter the "Underlying Action"), in favor of Plaintiff and against Defendants The Government of Iran and The Atomic Energy Organization of Iran in the sum of $3,788,930.79, plus interest. A copy of said Final Judgment is attached hereto as Exhibit A and incorporated herein. Although an

appeal from that judgment has been taken, which appeal is presently pending before the United States Court of Appeals for the Ninth Circuit as No. 81-5237, Defendants have sought neither a stay of execution nor posted a bond of supersedeas.

7. Plaintiff has not yet obtained judgments against certain Iranian bank defendants in the Underlying Action. Plaintiff's Underlying Action is pending before this Court against these certain Iranian bank defendants.

8. On or about December 20, 1979, January 4, 1980, February 4, 1980 and May 12, 1980, this Court in the Underlying Action granted orders for the issuance of, and regarding writs of attachment against property of defendants in the Underlying Action. Said Writs of attachments have been served on a number of banks and other individuals and corporations (hereinafter "Garnishees"), which have acknowledged that they hold deposit accounts or other assets in the name of defendants in Plaintiff's Underlying Action. Pursuant to Rule 64 of the Federal Rules of Civil Procedure and California Code of Civil Procedure Sections 481-010 *et seq.*, property of defendants in the Underlying Action held by the Garnishees is attached as security for Dames & Moore so that Dames & Moore may levy against said property to satisfy its judgment. In at least one instance, property is held in *custodia legis*, pursuant to this Court's Order of May 12, 1980 in the Underlyng Action.

9. On or about March 2, 1980 and March 3, 1980, Plaintiff sought writs of garnishment in the State of Washington to commence execution proceedings to satisfy its judgment in the Underlying Action. On March 2, 1981 the Superior Court of the State Washington for Snohomish County issued a writ of garnishment in favor of Plaintiff. A copy of said writ is incorporated and attached hereto as Exhibit B. On or about March 5, 1981, the Superior Court

of the State of Washington for Clark County issued a writ of execution and a notice of sale. A copy of said writ and notice is incorporated and attached hereto as Exhibit C.

10. On or about January 19, 1981, representatives of the United States reached a purported agreement with The Government of Iran involving release of the American hostages (the "Agreement"). The Agreement, in the form of two Declarations of the Government of the Democratic and Popular Government of Algeria, undertakes to "restore the financial position of Iran insofar as possible to that which existed prior to November 14, 1979." One of these Declarations states, *inter alia*:

> It is the purpose of both parties . . . to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration, relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in the United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

11. Under the Agreement, the United States further has agreed to bring about, within six months, the transfer to the Central Bank of Algeria of all "Iranian deposits" in United States banks. Such Agreement was entered into pursuant to the authorization of Jimmy Carter, President of the United States of America (the "President"). Said Agreement was not specifically authorized by the Congress of the United States of America and has not been approved or ratified by the Congress of the United States of America or the United

States Senate. A copy of said Agreement, and a related Declaration is attached hereto as Exhibit D and incorporated herein.

12. The Agreement also provides, *inter alia*, in a Declaration Concerning Claims Settlement, that: "claims arising under a binding contract between the parties specifically providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Maglis position."

13. The Contract between Dames & Moore and the AEOI, on which the Underlying Action is based, provides:

> Any dispute or disagreement arising under this Contract shall first be discussed amicably by both parties. Failing agreement, such dispute or disagreement shall be submitted to conciliation. Each party shall have the right to appoint one conciliator and a third conciliator shall be appointed by the Plan and the Budget Organization of the Government of Iran. In the event that either party is unwilling to accept the decision of the conciliation board, the matter shall be decided finally by resort to the courts of Iran.

14. On or about January 19, 1981, the President signed several Executive Orders purporting to implement the Agreement. These Executive Orders purport to be based on the President's authority under the "Constitution and statutes and including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. § 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code and Section 301 of the National Emergencies Act (50 U.S.C. § 1631)."

15. In such Executive Orders, the President decreed that all United States banking institutions in the possession of funds "legally or beneficially owned by the Government of Iran" are

> licensed, authorized, directed, and compelled to transfer such funds . . . to the Federal Reserve Bank of New York to be held or transferred as directed by the Secretary of the Treasury.

The President further decreed as follows:

> All persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power or privilege whether by Court Order or otherwise with respect to (Iran's assets in United States banks).

16. Under such Executive Orders, the President also ordered that all persons holding nonfund Iranian assets are to transfer those assets to Iran as directed by Iran, and all court orders, liens, and attachments relating to such property are nullified.

17. Under such Executive Orders, the President has delegated and authorized the Secretary to exercise the President's functions under the International Economic Emergency Powers Act to carry out the purposes of such Executive Orders. A copy of these Executive Orders (Executive Order Nos. 12277-12281) is attached hereto as Exhibit E and incorporated herein.

18. On February 24, 1981, President Reagan issued Executive Order 12,294 purporting to ''suspend'' all Iranian litigation which may ''arguably'' be presented to the Claims Tribunal established by Executive Agreement under the Algerian Declarations. (A copy of Executive Order 12,294 is attached hereto as Exhibit F and incorporated herein.)

19. On February 24, 1981, the Department of Treasury issued regulations implementing the Executive Orders of Presidents Carter and Reagan. (A copy of those Regulations is attached hereto as Exhibit G and incorporated herein.)

20. Under the purported authority of the Agreement and the Executive Orders, and the actions of the President and

the Secretary to enforce and implement them, actions may be taken to directly interfere with the property attached to secure satisfaction of this Court's Final Judgment, to directly interfere with Plaintiff's execution proceedings and the property which Plaintiff seeks to execute upon, to nullify the rights of Plaintiff to enforce its legal rights under such Final Judgment and threaten the jurisdiction of this Court and its right and duty to effectuate its Final Judgment and to continue to adjudicate the Underlying Action between Plaintiff and those defendants against which no judgment has been obtained.

FIRST CAUSE OF ACTION.

21. Plaintiff realleges and incorporates herein for all purposes Paragraphs 1 through 20 of this Complaint.

22. If construed to apply to Plaintiff, the execution, issuance, and enforcement of the Agreement and Executive Orders by President and the Secretary, purportedly acting on behalf of the United States, are in direct violation of the Constitution of the United States of America to the extent that they purport to nullify the Orders and Judgments of the Judicial Branch of Government, to interfere with property *in custodia legis* thereunder, and/or to prohibit Plaintiff from exercising its rights under Orders and Judgments of United States courts and state courts with respect to such property. Such actions violate Article III of the Constitution, Article II, Section 2 of the Constitution, the Constitutional principle of separation of powers, the rights of Plaintiff to due process of law and access to the courts under the First and Fifth Amendments to the Constitution, and the inherent powers and rights of the United States courts.

23. The execution, issuance, and enforcement of the Agreement and Execution Orders are beyond the powers of the President and the Secretary, purportedly acting on behalf

of the United States, to the extent that they purport to nullify the Orders and Judgments of the United States Courts, and/or interfere with property *in custodia legis* and/or prohibit Plaintiff from exercising its rights under Orders and Judgments of United States Courts and state courts with respect to such property and/or deny Plaintiff its right to pursue its action against certain Bank Defendants in the underlying action. Neither the Constitution nor the statutes of the United States, including those set forth in the Executive Orders, authorizes the nullification of Final Judgments, attachments or other orders of United States courts, the interference with property in the custody of such courts, or the prohibition of citizens from enforcing their legal rights.

24. Assuming arguendo that the execution, issuance, and enforcement of the Agreement and Executive Orders by the President and the Secretary, purportedly acting on behalf of the United States, were authorized by one or more statutes of the United States, then such statutes would be unconstitutional on their face and/or as applied to Plaintiff for the reasons set forth above.

25. The Agreement and such Executive Orders and the impending enforcement and execution of them by the Secretary, acting purportedly on behalf of the United States, will cause irreparable injury, loss, or damage to Plaintiff, for which there is no adequate remedy at law. A preliminary injunction to restrain actions by the Secretary and the United States which purport to nullify, interfere with, or abrogate this court's Final Judgment or its effectuation thereof and with Plaintiff's right to enforce its legal rights in United States or state courts, is essential to preserve the status quo while this court determines the legality of the actions set forth above, and to prevent irreparable injury, loss, or damage to Plaintiff for which there is no adequate remedy at law. Such a preliminary injunction is also necessary to pre-

vent a direct and serious deprivation of the constitutional and civil rights of Plaintiff, and to preserve the jurisdiction of this Court. Finally, such a preliminary injunction is necessary to aid Plaintiff in reaching property owned by Defendants The Government of Iran and the AEOI.

26. Upon final hearing hereof, Plaintiff is entitled to permanent injunctive relief to restrain the Secretary and the United States as set forth above.

SECOND CAUSE OF ACTION

27. Plaintiff realleges and incorporates herein for all purposes Paragraphs 1 through 21 of this Complaint.

28 Plaintiff is further entitled under 28 U.S.C. § 2201 to a declaratory judgment that, to the extent the Agreement, the Executive Order, and all other acts taken pursuant to or in the enforcement of either purport to authorize any nullification, interference with, or abrogation of Plaintiff's Final Judgment, its attachment of property to secure satisfaction of said Final Judgment, or with Plaintiff's right to enforce its legal rights in the United States courts, or with Plaintiff's execution proceedings in the State of Washington, or to terminate any further litigation against The Government of Iran, its agencies or instrumentalities, or otherwise interfere with the jurisdiction of the United States courts, or state courts enforcing the judgment of this Court, the Agreement, the Executive Order, and all other acts taken pursuant to or in the enforcement of either are contrary to the Constitution of the United States of America, beyond the statutory powers of the President and the Secretary acting on behalf of the United States, and/or that any statutes authorizing such acts are unconstitutional on their face and/or as applied, and are therefore null, void, and of no force and effect.

WHEREFORE, Plaintiff Dames & Moore prays that the Court grant the following relief:

1. That the Court issue a preliminary injunction restraining defendants during the pendency of this proceeding from taking any action to nullify, interfere with, or abrogate:

(a) The final judgment entered by this Court on February 18, 1981, in *Dames & Moore v. Atomic Energy Organization of Iran, et al.* (CV 79-04918 LEW (Px)); and/or

(b) Plaintiff's attempts to execute on that final judgment, including, but not limited to those which have commenced in the State of Washington; and/or

(c) Plaintiff's prejudgment attachments against property of defendants in *Dames & Moore v. Atomic Energy Organization of Iran, et al.* (CV 79-04918 LEW (Px)); and/or

(d) Plaintiff's right to continue to enforce and prosecute its claims against those defendants against those defendants against which no judgment has been obtained in *Dames & Moore v. Atomic Energy Organization of Iran, et al.* (CV 79-04918 LEW (Px)).

2. That upon final hearing hereof, the Court issue permanent injunctive relief restraining defendants during the pendency of this proceeding from taking any action to nullify, interfere with, or abrogate:

(a) The final judgment entered by this Court on February 18, 1981, in *Dames & Moore v. Atomic Energy Organization of Iran, et al.* (CV 79-04918 LEW (Px)); and/or

(b) Plaintiff's attempts to execute on that final judgment, including, but not limited to those which have commenced in the State of Washington; and/or

(c) Plaintiff's prejudgment attachments against property of defendants in *Dames & Moore v. Atomic Energy Organization of Iran, et al.* (CV 79-04918

LEW (Px)); and/or

(d) Plaintiff's right to continue to enforce and prosecute its claims against those defendants against those defendants against which no judgment has been obtained in *Dames & Moore v. Atomic Energy Organization of Iran et al.*, (CV 79-04918 LEW (Px)).

3. That upon final hearing hereof, the Court issue a declaratory judgment that to the extent the Agreement, the Executive Order, and all other acts taken pursuant to or in the enforcement of either purport to authorize any nullification, interference with, or abrogation of Plaintiff's Final Judgment, its attachment of property to secure satisfaction of said Final Judgment, or with Plaintiff's right to enforce its legal rights in the United States courts, or with Plaintiff's execution proceedings in the State of Washington, or to terminate any further litigation against The Government of Iran, its agencies or instrumentalities, or otherwise interfere with the jurisdiction of the United States courts, or state courts enforcing the judgment of this Court, the Agreement, the Executive Order, and all other acts taken pursuant to or in the enforcement of either are contrary to the Constitution of the United States of America, beyond the statutory powers of the President and the Secretary acting on behalf of the United States, and/or that any statutes authorizing such acts are unconstitutional on their face and/or as applied, and are therefore null, void, and of no force and effect.

4. For attorneys' fees, costs, and such other and further relief to which Plaintiff may be entitled.

Dated: April 27, 1981.

Respectfully submitted,

TUTTLE & TAYLOR Incorporated
MERLIN W. CALL
C. STEPHEN HOWARD
WILLIAM C. SCHWEINFURTH
JEFFREY M. HAMERLING

/s/ JEFFREY M. HAMERLING
Jeffrey M. Hamerling, a member of
the law firm of TUTTLE & TAYLOR
Incorporated, Attorneys for
Plaintiff

EXHIBIT A.

Judgment Against Defendants Atomic Energy Organization of Iran and State and Government of Iran, Date: February 17, 1981, Time: 9:00 A.M.

United States District Court, Central District of California.

Dames & Moore, a partnership, Plaintiff, v. Atomic Energy Organization of Iran, State and Government of Iran, Bank Melli Iran, Industrial Credit Bank, Industrial and Mining Development Bank of Iran, International Bank of Iran, Agricultural Development Bank of Iran, Bank Markazi Iran, Bank of Tehran, Agricultural Cooperative Bank of Iran, Bank Bazargani Iran, Bank Bimeh Iran, Bank Iranshahr, Bank Dariush, Bank Kar, The Bank of Iran and the Middle East, Bank of Omran, Bank Pars, Bank Rafah Kargaran, Bank Saderat Iran, Bank Sakhteman, Bank Sanaye Iran, Bank Sepah, Bank Shahryar, Banque Etebarate Iran, Development and Investment Bank of Iran, Distributors Cooperative Credit Bank, the Foreign Trade Bank of Iran, Defendants. No. CV 79-04918 LEW (Px).

Filed and Entered: Feb. 18, 1981.

The Motion of Plaintiff Dames & Moore (''Plaintiff'') for Summary Judgment against Defendants Atomic Energy Organization of Iran (''AEOI'') and State and Government of Iran having come on for hearing on Tuesday, February 17, 1981, at 9:00 A.M. and the Court having considered the papers filed by the parties and having heard the arguments of counsel; and the Court having made findings of fact and conclusions of law, and good cause appearing;

IT IS HEREBY ORDERED that the Motion of Plaintiff for Summary Judgment against Defendants AEOI and Iran is granted; and

IT IS FURTHER ADJUDGED, ORDERED, and DECREED that:

1. Plaintiff shall have judgment against defendants AEOI and the State and Government of Iran (or any other name by which the State and Government of Iran refers to itself, including, but not limited to the Islamic Republic of Iran) in the amount of $3,788,930.79 (which amount includes interest to January 31, 1981 at the contract rate of six percent in the amount of $351,377.77) plus interest after January 31, 1981 at the contract rate of six percent in the amount of $565.07 per day.

2. There is no just reason for delay in entering final judgment and therefore, the Court expressly directs that final judgment be entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: February 18, 1981

/s/ Laughlin E. Waters
Laughlin E. Waters
United States District Judge

Presented By:

TUTTLE & TAYLOR Incorporated
MERLIN W. CALL
C. STEPHEN HOWARD
WILLIAM C. SCHWEINFURTH
JEFFREY M. HAMERLING

/s/ C. Stephen Howard
C. Stephen Howard, a member of
the law firm of Tuttle & Taylor
Incorporated, Attorneys for

[Notarized]

EXHIBIT B.

Writ of Garnishment.

Superior Court of Washington for Snohomish County.

Dames & Moore, a partnership, Plaintiff, v. Atomic Energy Organization of Iran, State and Government of Iran, et al., Defendants, and The Boeing Company and Boeing Domestic Sales Corporation, Garnishee. Cause No. 81-2-00665-3.

The State of Washington to: The Boeing Company and The Boeing Domestic Sales Corporation, Garnishee, and to: Atomic Energy Organization of Iran and State and Government of Iran, Defendants.

The above-named plaintiff claims that the above-named defendants are indebted to plaintiff and that the amount of $4,185,341.04 should be held to satisfy that indebtedness and has applied for a writ garnishment against you.

YOU ARE HEREBY COMMANDED to answer this writ by filling in the attached form according to the instructions thereon, and you must mail or deliver the original of such answer to the court, one copy to the plaintiff or its attorney and one copy to the defendants within 20 days after the service of the writ upon you.

Unless directed by the court, do not pay any debt, whether wages subject to this garnishment or any other debt, owed the defendants when this writ was served, or deliver, sell or transfer, or recognize any sale or transfer of, any personal property or effects of the defendants in your possession or control when this writ was served; any such payment, delivery, sale or transfer is void as to so much of the debt, property or shares as are necessary to satisfy plaintiff's claim and costs for this writ with interest.

In the event that you owe to defendants a debt payable in money and subject to this garnishment in excess of the

amount set forth in the first paragraph of this garnishment, hold only the amount set forth in said first paragraph of this garnishment and release all additional funds or property defendants.

WHETHER OR NOT YOU OWE ANYTHING TO DEFENDANTS, YOUR FAILURE TO ANSWER AS REQUIRED MAY MAKE YOU LIABLE FOR DEFENDANTS' CLAIMED DEBT TO PLAINTIFF.

WITNESS, the Honorable Robert C. Bibb, Judge of the Superior Court and the seal thereof, this 2nd day of March, 1981.

KAY D. ANDERSON
Clerk of the Superior Court
/s/ By Denise Foster

Wickwire, Lewis, Goldmark
& Schorr

/s/ Peggy Williams
Kevin F. Kelly
Peggy J. Williams
Attorneys for Plaintiff

EXHIBIT C.
Writ of Execution.

Superior Court of Washington for Clark County.

Dames & Moore, partnership, Plaintiff vs. Atomic Energy Organization of Iran, State and Government of Iran, et al., Defendants No,. 81-00290-4.

The State of Washington To the Sheriff of Clark County:

Whereas, Dames & Moore, a partnership, plaintiff, Recovered Judgment against the State and Government of Iran, and Atomic Energy Organization of Iran, defendants in the Superior Court of Clark County State of Washington, on the 19th day of February A.D. 1981 for the sum of $3,788,930.79 Dollars, with interest at the rate of 6 percent per annum from Jan. 31, 1981, cost of suit, taxed at $....., and an attorney's fee of $....., with interest on attorney's fee and costs to the rate of ... percent per annum from .....

THEREFORE, in the name of the State of Washington, you are hereby commanded forthwith to levy upon, seize and take into execution, the personal property of the said State and Government of Iran, and Atomic Energy Organization of Iran, in your County, sufficient to execution and to satisfy said judgment, interest and increased interest, costs and increased costs, and make sale thereof according to law; and if sufficient personal property cannot be found, then your are further commanded to make the amount of said judgment, interest and increased interest, costs and increased costs, out of all property tangible or intangible, including interests in property held by defendants and/or debts owing to defendants and/or property held for the benefit of or subject to the control of defendants not exempt by law, and make return of writ within sixty days from the date hereof.

WITNESS, The Hon. Presiding Judge of said Superior Court, and the seal of the said court this 5th day of March 1981.

Kevin F. Kelly, Peggy J. Williams
Wickwire, Lewis, Goldmark & Schorr
500 Maynard Building
Seattle, Washington 98104
Attorneys for plaintiff Dames & Moore
By /s/ [illegible]
Superior Court Clerk.
Deputy Clerk.

NOTICE

Sheriff's Sale of Personal Property

State of Washington, County of Clark, ss. Dames Moore, a partnership.

BY VIRTUE OF AN EXECUTION Atomic Energy Organization of Iran, State and Government of Iran, State and Government of Iran, et al., issued out of the Superior Court of the State of Washington for the County of Clark, and to me directed and delivered, for a judgment rendered in said Court on the 19th day of February A.D., 1981, in favor of DAMES & MOORE, a partnership Plaintiff, and against Atomic Energy Organization of Iran, State and Government of Iran, Defendants, and for the sum of $3,788,930.79 with interest at the rate of 6% per cent, per annum from said 31st day of January A.D., 1981, and for the further sum of $. . . . . attorney's fees, and $. . . . . cost of suit, I have levied upon Writ of Execution issued on March 5th, 1981 the following described personal property, to-wit:

> All property of the State and Government of Iran, including any property held in the name of its Ministry of Roads and Transportation, stored at the Port of Vancouver. This property includes, but is not limited to, portable modular housing units, together with all furnishings, fixtures and other items accompanying such units, construction equipment, and rock crushing equipment, in which the State and Government of Iran has an interest.

Notice is Hereby Given, That on the day of To be set A.D., 1981, at the hour of 2:00 o'clock P.M. of said day at 3103 Lower River Rd., Vancouver, Washington in the said County of Clark, I will sell all the right, title and interest of the said Atomic Energy Organization of Iran, State and Government of Iran, Defendants in and to the above described personal property at public auction, to the highest

and best bidder for cash, to satisfy said Dames & Moore, a Partnership and all costs.

Given under my hand this 5th day of March 1981.

FRANK KANEKOA, Sheriff
/s/ By Robert L. Songer, Deputy
ROBERT L. SONGER
Ct Civil Deputy

EXHIBIT D.

Declaration of the Government of the Democratic and Popular Republic of Algeria.

The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran. On the basis of formal adherences received from Iran and the United States, the Government of Algeria now declares that the following interdependent commitments have been made by the two governments:

GENERAL PRINCIPLES

The undertakings reflected in this Declaration are based on the following general principles:

A. Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

B. It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular

Republic of Algeria, to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration, relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

Point I: Non-Intervention in Iranian Affairs

1. The United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs.

Points II and III: Return of Iranian Assets and Settlement of U.S. Claims

2. Iran and the United States (hereinafter ''the parties'') will immediately select a mutually agreeable central bank (hereinafter ''the Central Bank'') to act, under the instructions of the Government of Algeria and the Central Bank of Algeria (hereinafter ''The Algerian Central Bank'') as depositary of the escrow and security funds hereinafter prescribed and will promptly enter into depositary arrangements with the Central Bank in accordance with the terms of this declaration. All funds placed in escrow with the Central Bank pursuant to this declaration shall be held in an account in the name of the Algerian Central Bank. Certain procedures for implementing the obligations set forth in this Declaration and in the Declaration of the Democratic and Popular Republic of Algeria concerning the settlement of claims

by the Government of the United States and the Government of the Islamic Republic of Iran (hereinafter ''the Claims Settlement Agreement'') are separately set forth in certain Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Democratic and Popular Republic of Algeria.

3. The depositary arrangements shall provide that, in the event that the Government of Algeria certifies to the Algerian Central Bank that the 52 U.S. nationals have safely departed from Iran, the Algerian Central Bank will thereupon instruct the Central Bank to transfer immediately all monies or other assets in escrow with the Central Bank pursuant to this declaration, provided that at any time prior to the making of such certification by the Government of Algeria, each of the two parties, Iran and the United States, shall have the right on seventy-two hours notice to terminate its commitments under this declaration.

If such notice is given by the United States and the foregoing certification is made by the Government of Algeria within the seventy-two hour period of notice, the Algerian Central Bank will thereupon instruct the Central Bank to transfer such monies and assets. If the seventy-two hour period of notice by the United States expires without such a certification having been made, or if the notice of termination is delivered by Iran, the Algerian Central Bank will thereupon instruct the Central Bank to return all such monies and assets to the United States, and thereafter the commitments reflected in this declaration shall be of no further force and effect.

ASSETS IN THE FEDERAL RESERVE BANK

4. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States

will bring about the transfer to the Central Bank of all gold bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all other Iranian assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3 above.

ASSETS IN FOREIGN BRANCHES OF U.S. BANKS

5. Commencing upon the completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank, to the account of the Algerian Central Bank, of all Iranian deposits and securities which on or after November 14, 1979, stood upon the books of overseas banking offices of U.S. banks, together with interest thereon through December 31, 1980, to be held by the Central Bank, to the account of the Algerian Central Bank, in escrow until such time as their transfer or return is required in accordance with Paragraph 3 of this Declaration.

ASSETS IN U.S. BRANCHES OF U.S. BANKS

6. Commencing with the adherence by Iran and the United States to this declaration and the claims settlement agreement attached hereto, and following the conclusion of arrangements with the Central Bank for the establishment of the interest-bearing security account specified in that agreement and Paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3.

7. As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing security account in the Central Bank, until the balance in the security account has reached the level of $1 billion. After the $1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the security account are to be used for the sole purpose of securing payment of, and paying, claims against Iran in accordance with the claims settlement agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the security account has fallen below $500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of $500 million in the account. The account shall be maintained until the President of the Arbitral Tribunal established pursuant to the claims settlement agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the claims settlement agreement, at which point any amount remaining in the security account shall be transferred to Iran.

OTHER ASSETS IN THE U.S. AND ABROAD

8. Commencing with the adherence of Iran and the United States to this declaration and the attached claims settlement agreement and the conclusion of arrangements for the establishment of the security account, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad, apart from those assets referred to in

Paragraph 5 and 6 above, to be held by the Central Bank in escrow until their transfer or return is required by Paragraph 3 above.

9. Commencing with the adherence by Iran and the United States to this declaration and the attached claims settlement agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.

NULLIFICATION OF SANCTIONS AND CLAIMS

10. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will revoke all trade sanctions which were directed against Iran in the period November 4, 1979, to date.

11. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals of their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and

preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.

Point IV: Return of the Assets of the Family of the Former Shah

12. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will freeze, and prohibit any transfer of, property and assets in the United States within the control of the estate of the former Shah or of any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran. As to any such defendant, including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by U.S. law.

13. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will order all persons within the U.S. jurisdiction to report to the U.S. Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3, 1979, and as of the date of the order, with respect to the property and assets referred to in Paragraph 12. Violation of the requirement will be subject to the civil and criminal penalties prescribed by U.S. law.

14. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will make known, to all appropriate U.S. courts, that in any litigation of the kind described in Paragraph 12 above the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of

state doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law.

15. As to any judgment of a U.S. court which calls for the transfer of any property or assets to Iran, the United States hereby guarantees the enforcement of the final judgment to the extent that the property or assets exist within the United States.

16. If any dispute arises between the parties as to whether the United States has fulfilled any obligation imposed upon it by Paragraphs 12-15, inclusive, Iran may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. If the tribunal determines that Iran has suffered a loss as a result of a failure by the United States to fulfill such obligation, it shall make an appropriate award in favor of Iran which may be enforced by Iran in the courts of any nation in accordance with its laws.

SETTLEMENT OF DISPUTES

17. If any other dispute arises between the parties as to the interpretation or performance of any provision of this declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the claims settlement agreement. Any decision of the tribunal with respect to such dispute, including any award of damage to compensate for a loss resulting from a breach of this declaration or the claims settlement agreement; may be enforced by the prevailing party in the courts of any nation in accordance with its laws.

Initialed on January 19, 1981

By Warren M. Christopher

Deputy Secretary of State of the Government of the United States

By virtue of the powers vested in him by his Government as deposited with the Government of Algeria.

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran.

The Government of the Democratic and Popular Republic of Algeria, on the basis of formal notice of adherence received from the Government of the Islamic Republic of Iran and the Government of the United States of America, now declares that Iran and the United States have agreed as follows:

ARTICLE I

Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this agreement shall be submitted to binding third-party arbitration in accordance with the terms of this agreement. The aforementioned six months' period may be extended once by three months at the request of either party.

ARTICLE II

1. An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures

affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position.

2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.

3 The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that declaration.

ARTICLE III

1. The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this agreement, each government shall appoint one-third of the members. Within thirty days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.

2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the tribunal to ensure that this agreement can be carried out. The UNCITNAL rules for appointing members of three-member Tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal.

3. Claims of nationals of the United States and Iran that are within the scope of this agreement shall be presented to the Tribunal either by claimants themselves, or, in the case of claims of less than $250,000, by the Government of such national.

4. No claim may be filed with the Tribunal more than one year after the entry into force of this agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 7 of the Declaration of the Government of Algeria of January 19, 1981.

ARTICLE IV

1. All decisions and awards of the Tribunal shall be final and binding.

2. The President of the Tribunal shall certify, as prescribed in Paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this agreement have been satisfied.

3. Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

ARTICLE V

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

ARTICLE VI

1. The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.

2. Each government shall designate an agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communication directed to it or to its nationals, agencies, instrumentalities, or entitled in connection with proceedings before the Tribunal.

3. The expenses of the Tribunal shall be borne equally by the two governments.

4. Any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon the request of either Iran or the United States.

ARTICLE VII

For the purposes of this agreement:

1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.

2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this agareement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in judicial persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this agreement. Claims referred to the Arbitral Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

3. "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

4. The "United States" means the Government of the United States, any political subdivision of the United States, any agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof.

ARTICLE VIII

This agreement shall enter into force when the Government of Algeria has received from both Iran and the United States a notification of adherence to the agreement.

Initialed on January 19, 1981
by Warren M. Christopher

Deputy Secretary of State of the Government of the United States

By virtue of the powers vested in him by his Government as deposited with the Government of Algeria.

EXHIBIT E.

Executive Order 12277 of January 19, 1981.

Direction To Transfer Iranian Government Assets.

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act [50 U.S.C. 1702], Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act [50 U.S.C. 1631], in view of the continuing unusual and extraordinary threat to the national security; foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran and in which Iran and the United States instruct and inquire that the assets described in this order shall be transferred as set forth below by the holders of such assets, it is hereby ordered that as of the effective date of this Order:

1-101. The Federal Reserve Bank of New York is licensed, authorized, directed, and compelled to transfer to accounts at the Bank of England, and subsequently to transfer to accounts at the Bank of England established pursuant to an escrow agreement approved by the Secretary of the Treasury, all gold bullion, and other assets (or the equivalent

thereof) in its custody, of the Government of Iran, or its agencies, instrumentalities or controlled entities. Such transfers shall be executed when and in the manner directed by the Secretary of the Treasury. The Secretary of the Treasury is also authorized to license, authorize, direct, and compel the Federal Reserve Bank of New York to engage in whatever further transaction he deems appropriate and consistent with the purposes of this Order, including any transactions related the the return of such bullion and other assets pursuant to the escrow agreement.

1-102. (a) All licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order, attachment, or otherwise, including the license contained in Section 535.504 of the Iranian Assets Control Regulations, with respect to the properties described in Section 1-101 of this Order are revoked and withdrawn.

(b) All rights, powers, and privileges relating to the properties described in section 1-101 of this Order and which derive from any attachment, injunction, other like proceedings or process, or other action in any litigation after November 14, 1979, at 8:10 a.m. EST, including those derived from Section 535.504 of the Iranian Assets Control Regulations, other than rights, powers, and privileges of the Government of Iran and its agencies, instrumentalities, and controlled entities, whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power, or privilege are hereafter barred from exercising the same.

(c) All persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power, or privilege, whether by court order or otherwise, with respect to the properties (and any income earned thereon) referred to in Section 1-101 of this Order.

1-103. Compliance with this Order, any other Executive Order licensing, authorizing, directing, or compelling the transfer of the assets described in section 1-101 of this Order, or any regulations, instructions, or directions issued thereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, such orders, regulations, instructions, or directions.

1-104. The Attorney General shall seek to intervene in any litigation within the United States which arises out of this Order and shall, among other things, defend the legality of, and all actions taken pursuant to, each of its provisions.

1-105. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act [50 U.S.C. 1701 *et seq.*] to carry out the purposes of this Order.

1-106. This Order shall be effective immediately.

THE WHITE HOUSE.

January 19, 1981.

/s/ Jimmy Carter

Executive Order 12278 of January 19, 1981.

Direction To Transfer Iranian Government Assets Overseas.

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1831), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran and in which Iran and the United States instruct and require that the assets described in this Order shall be transferred as set forth below by the holders of such assets, it is hereby ordered that as of the effective date of this Order:

1-101. Any branch or office of a United States bank or subsidiary thereof, which branch or office is located outside the territory of the United States and which on or after 8:10 a.m. E.S.T. on November 14, 1979 (a) has been or is in possession of funds or securities legally or beneficially owned by the Government of Iran or its agencies, instrumentalities, or controlled entities, or (b) has carried or is

carrying on its books deposits standing to the credit of or beneficially owned by such Government, agencies, instrumentalities, or controlled entitles, is licensed, authorized, directed, and compelled to transfer such funds, securities, and deposits, including interest from November 14, 1979, at commercially reasonable rates, to the account of the Federal Reserve Bank of New York at the Bank of England, to be held or transferred as directed by the Secretary of the Treasury. The Secretary of the Treasury shall determine when the transfers required by this section shall take place. The funds, securities and deposits described in this section shall be further transferred as provided for in the Declaration of the Government of the Democratic and Popular Republic of Algeria and its Annex.

1-102. Any banking institution subject to the jurisdiction of the United States that has executed a set-off on or after November 14, 1979, at 8:10 a.m. E.S.T. against iranian funds, securities, authorized, directed, and compelled to cancel such set-off and to transfer all funds, securities, and deposits which have been subject to such set-off, or deposits referred to in section 1-101 is hereby licensed, including interest from November 14, 1979, at commercially reasonable rates, pursuant to the provisions of section 1-101 of this Order.

1-103. If the funds, securities, and deposits described in section 1-101 are not promptly transferred to the control of the Government of Iran, such funds, securities, and deposits shall be returned to the banking institutions holding them on the effective date of this Order and the set-offs described in section 1-102 shall be in force as if this Order had not been issued and the status of all such funds, securities, deposits and set-offs shall be *status quo ante*.

1-104. (a) All licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order,

attachment, or otherwise, including the license contained in Section 535.504 of the Iranian Assets Control Regulations, with respect to the properties described in Sections 1-101 and 1-102 of this Order are revoked and withdrawn.

(b) All rights, powers, and privileges relating to the properties described in Sections 1-101 and 1-102 of this Order and which derive from any attachment, injunction, other like proceedings or process, or other action in any litigation after November 14, 1979, at 8:10 a.m. E.S.T., including those derived from Section 535.504 of the Iranian Assets Control Regulations, other than rights, powers, and privileges of the Government of Iran and its agencies, instrumentalities, and controlled entities, whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power, or privilege are hereafter barred from exercising the same.

(c) All persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power, or privilege, whether by court order or otherwise, with respect to the properties (and any income earned thereon) referred to in Sections 1-101 and 1-102 of this Order.

1-105. Compliance with this Order, any other Executive Order licensing, authorizing, directing, or compelling the transfer of the assets described in Sections 1-101 and 1-102 of this Order, or any regulations, instructions, or directions issued thereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, such orders, regulations, instructions, or directions.

1-106. The Attorney General shall seek to intervene in any litigation within the United States which arises out of this Order and shall, among other things, defend the legality of, and all actions taken pursuant to, each of its provisions.

1-107. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purposes of this Order.

1-108. This Order shall be effective immediately.

THE WHITE HOUSE,
January 19, 1981.

/s/ Jimmy Carter

Executive Order 12279 of January 19, 1981.

Direction To Transfer Iranian Government Assets Held by Domestic Banks.

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 22 of the United States Code, Section 1732 of 3 Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran and in which Iran and the United States instruct and require that the assets described in this Order shall be transferred as set forth below by the holders of such assets, it is hereby ordered that as of the effective date of this Order.

1-101. Any branch or office of a banking institution subject to the jurisdiction of the United States, which branch or office is located within the United States and is, on the effective date, either (a) in possession of funds or securities legally or beneficially owned by the Government of Iran or its agencies, instrumentalities, or controlled entities, or (b) carrying on its books deposits standing to the credit of or

beneficially owned by such Government, agencies, instrumentalities, or controlled entities is licensed, authorized, directed and compelled to transfer such funds, securities, and deposits, including interest from November 14, 1979, at commercially reasonable rates, to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury.

1-102. (a) All licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order, attachment, or otherwise, including the license contained in Section 535.504 of the Iranian Assets Control Regulations, with respect to the properties described in Section 1-101 of this Order are revoked and withdrawn.

(b) All rights, powers, and privileges relating to the properties described in section 1-101 of this Order and which derive from any attachment, injunction, other like proceedings or process, or other action in any litigation after November 14, 1979, at 8:10 a.m. EST, including those derived from Section 535.504 of the Iranian Assets Control Regulations, other than rights, powers, and privileges of the Government of Iran and its agencies, instrumentalities, and controlled entrities, whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power, or privilege are hereafter barred from exercising the same.

(c) All persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power, or privilege whether by court order or otherwise, with respect to the properties (and any income thereon) referred to in Section 1-101 of this Order.

1-103. Compliance with this Order, any other Executive Order licensing, authorizing, directing or compelling the transfer of the assets described in section 1-101 of this

Order, or any regulations, instructions, or directions issued thereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No persons shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, such orders, regulations, instructions, or directions.

1-104. The Attorney General shall seek to intervene in any litigation within the United States which arises out of this Order and shall, among other things, defend the legality of, and all actions taken pursuant to, each of its provisions.

1-105. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act [50 U.S.C. 1701 *et seq.*] to carry out the purposes of this Order.

1-106. This Order shall be effective immediately.

THE WHITE HOUSE

January 19, 1981.

/s/ Jimmy Carter

Executive Order 12280 of January 19, 1981.

Direction To Transfer Iranian Government Financial Assets Held by Non-Banking Institutions.

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act [50 U.S.C. 1702], Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act [50 U.S.C. 1631], in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran and in which Iran and the United States instruct and require that the assets described in this Order shall be transferred as set forth below by the holders of such assets, it is hereby ordered that as of the effective date of this Order:

1-101. Any person subject to the jurisdiction of the United States which is not a banking institution and is on the effective date in possession or control of funds or securities of Iran or its agencies, instrumentalities, or controlled entities is licensed, authorized, directed and compelled to transfer such funds or securities to the Federal Reserve Bank

of New York to be held or transferred as directed by the Secretary of the Treasury.

1-102. (a) All licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order, attachment, or otherwise, including the license contained in Section 535.504 of the Iranian Assets Control Regulations, with respect to the properties described in Section 1-101 of this Order are revoked and withdrawn.

(b) All rights, powers, and privileges relating to the properties described in section 1-101 of this Order and which derive from any attachment, injunction, other like proceedings or process, or other action in any litigation after November 14, 1979, at 8:10 a.m. EST, including those derived from Section 535.504 of the Iranian Assets control Regulations, other than rights, powers, and privileges of the Government of Iran and its agencies, instrumentalities, and controlled entities, whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power, or privilege are hereafter barred from exercising the same.

(c) All persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power, or privilege, whether by court order or otherwise, with respect to the properties (and any income earned thereon) referred to in Section 1-101 of this Order.

1-103. Compliance with the Executive Order, any other Executive Order licensing, authorizing, directing or compelling the transfer of the assets described in paragraph 1-101 of this Order, or any regulations, instructions, or directions issued thereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done

or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, such orders, regulations, instructions, or directions.

1-104. The Attorney General shall seek to intervene in any litigation within the United States which arises out of this Order and shall, among other things, defend the legality of an all actions taken pursuant to, each of its provisions.

1-105. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act [50 U.S.C. 1701 *et seq.*] to carry out the purposes of this Order.

1-106. This Order shall be effective immediately.

THE WHITE HOUSE.

January 19, 1981.

/s/ Jimmy Carter

Executive Order 12281 of January 19, 1981.

Direction To Transfer Certain Iranian Government Assets.

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran and in which Iran and the United States instruct and require that the assets described in this Order shall be transferred as set forth below by the holders of such assets, it is hereby ordered that as of the effective date of this Order:

1-101. All persons subject to the jurisdiction of the United States in possession or control of properties, not including funds and securities, owned by Iran or its agencies, instrumentalities, or controlled entities are licensed, authorized, directed and compelled to transfer such properties, as directed after the effective date of this Order by the Government of Iran, acting through its authorized agent.

Except where specifically stated, this license, authorization, and direction does not relieve persons subject to the jurisdiction of the United States from existing legal requirements other than those based upon the International Emergency Economic Powers Act.

1-102. (a) All licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order, attachment, or otherwise, including the license contained in Section 535.504 of the Iranian Assets Control Regulations, with respect to the properties described in Section 1-101 of this Order are revoked and withdrawn.

(b) All rights, powers, and privileges relating to the properties described in section 1-101 of this Order and which derive from any attachment, injunction, other like proceedings or process, or other action in any litigation after November 14, 1979, at 8:10 a.m. EST, including those derived from Section 535.504 of the Iranian Assets Control Regulations, other than rights, powers, and privileges of the Government of Iran and its agencies, instrumentalities, and controlled entities, whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power, or privilege are hereafter barred from exercising the same.

(c) All persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power, or privilege, whether by court order or otherwise, with respect to the properties (and any income earned thereon) referred to in Section 1-101 of this Order.

1-103. Compliance with this Executive Order, any other Executive Order licensing, authorizing, directing or compelling the transfer of the assets described in paragraph 1-101 of this Order, or any regulations, instructions, or directions issued thereunder shall to the extent thereof be

a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, such orders, regulations, instructions, or directions.

1-104. The Attorney General shall seek to intervene in any litigation within the United States which arises out of this Order and shall, among other things, defend the legality of, and all actions taken pursuant to, each of its provisions.

1-105. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purposes of this Order.

1-106. This Order shall be effective immediately.

THE WHITE HOUSE,
January 19, 1981.

/s/ Jimmy Carter

EXHIBIT F.

Executive Order 12294 of February 24, 1981.

Suspension of Litigation Against Iran.

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which were based the declarations of national emergency in Executive Order No. 12170, issued November 14, 1979, and in Executive Order No. 12211, issued April 17, 1980, in light of the agreement with the Government of Iran, as reflected in the Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of United States diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, in order to implement Article II of the Declaration of Algeria concerning the settlement of claims and to begin the process of normalization of relations between the United States and Iran, it is hereby ordered that as of the effective date of this Order:

Section 1. All claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except

as they may be presented to the Tribunal. During the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States, including the courts of any state or any locality thereof, the District of Columbia and Puerto Rico, or in any action commenced in any such court after the effective date of this Order. Nothing in this action precludes the commencement of an action after the effective date of this Order for the purpose of tolling the period of limitations for commencement of such action.

Section 2. Nothing in this Order shall require dismissal of any action for want of prosecution.

Section 3. Suspension under this Order of a claim or a portion thereof submitted to the Iran-United States Claims Tribunal for adjudication shall terminate upon a determination by the Tribunal that it does not have jurisdiction over such claim or such portion thereof.

Section 4. A determination by the Iran-United States Claims Tribunal on the merits that a claimant is not entitled to recover on a claim shall operate as a final resolution and discharge of the claim for all purposes. A determination by the Tribunal that a claimant shall have recovery on a claim in a specified amount shall operate as a final resolution and discharge of the claim for all purposes upon payment to the claimant of the full amount of the award, including any interest awarded by the Tribunal.

Section 5. Nothing in this Order shall apply to any claim concerning the validity or payment of a standby letter of credit, performance or payment bond or other similar instrument.

Section 6. Nothing in this Order shall prohibit the assertion of a counterclaim or set-off by a United States national in any judicial proceeding pending or hereafter commenced

by the Government of Iran, any political subdivision of Iran, any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

Section 7. The Secretary of the Treasury is authorized to employ all powers granted to me by the International Emergency Economic Powers Act and by 22 U.S.C. § 1732 to carry out the purposes of this Order.

Section 8. Executive Order Nos. 12276 through 12285 of January 19, 1981, are ratified.

This Order shall be effective immediately and copies shall be transmitted to the Congress.

THE WHITE HOUSE,
February 24, 1981.

/s/ Ronald Reagan

Editorial Note: The President's message to the Congress, dated Feb. 24, 1981, on Executive Order 12294, is printed in the Weekly Compilation of Presidential Documents (vol. 17, no. 9).

EXHIBIT G.

February 26, 1981 Amendments to Iranian Assets Control Regulations, 31 C.F.R. Part 535.

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 535

Iranian Assets Control Regulations;
Restrictions on Property of the Former Shah of Iran

AGENCY: Office of Foreign Assets Control.

ACTION: Final rule.

SUMMARY: The Office of Foreign Assets Control is amending the Iranian Assets Control Regulations. The purpose of the amendment is to prohibit transfers of all property and assets located in the United States within the control of the estate of the former Shah of Iran or any close relative of the former Shah served as a defendant in litigation in courts within the United States brought by Iran seeking the return of property alleged to belong to Iran. The need for the amendment is to implement the provisions of Executive Order No. 12284, signed by the President on January 19, 1981, requiring the blocking of such property and assets to protect the rights of litigants in courts within the United States, and directing the Secretary of the Treasury to require reports on such property and assets. The effect of the amendment is that all transfers of such property and assets will be prohibited when Iran proves to the Office of Foreign Assets Control (OFAC) that there has been service in such cases on such persons and OFAC publishes a notice to this effect in the Federal Register.

EFFECTIVE DATE: January 19, 1981.

FOR FURTHER INFORMATION CONTACT: Raymond W. Konan, Chief Counsel, Office of Foreign Assets Control, Department of the Treasury, Washington, D.C. 20220, Tel. (202) 376-0236).

SUPPLEMENTARY INFORMATION: Since the regulations involve a foreign affairs function, the provisions of the Administrative Procedure Act, 5 U.S.C. 553, requiring notice of proposed rulemaking, opportunity for public participation and delay in effective date are inapplicable.

Pursuant to Executive Order 12284 of January 19, 1981 the Office of Foreign Assets Control will conduct a census of property and assets within the control of the estate of the former Shah or close relatives of the former Shah served in litigation by Iran. Litigation has been filed naming numerous individuals. To avoid duplication, the census will be temporarily deferred to allow a period of time in which the Government of Iran may provide proof of service of defendants to the Office of Foreign Assets Control.

31 CFR Part 535 is amended as follows:

1. Section 535.217 is added to read as follows:

§ 535.217 Blocking of property of the former Shah of Iran and of certain other Iranian nationals.

(a) For the purpose of protecting the rights of litigants in courts within the United States, all property and assets located in the United States in the control of the estate of Mohammad Reza Pahlavi, the former Shah of Iran, or any close relative of the former Shah served as a defendant in litigation in such courts brought by Iran seeking the return of property alleged to belong to Iran, is blocked as to each such estate or person, until all such litigation against such estate or person is finally terminated. This provision shall apply only to such persons as to which Iran has furnished proof of service to the Office of Foreign Assets Control and

which the Office has identified in paragraph (b) of this section.

(b) (Reserved)

(c) The effective date of this section is January 19, 1981.

Section 535.580 is added to read as follows:

§ 635.580 Necessary living expenses of relatives of the former Shah of Iran.

The transfer, payment or withdrawal of property described in § 353.217 is authorized to the extent necessary to pay living expenses of any individual listed in that section. Living expenses for this purpose shall include food, housing, transportation, security and other personal expenses.

(Sec. 201-207, 91 Stat. 1625, 50 U.S.C. 1701-1706; E.O. No. 12170, 44 FR 65729; E.O. No. 12211, 45 FR 26685; E.O. No. 12284, 48 FR 7929)

Dated February 24, 1981.

Dennis M. O'Connell, *Director*.

Approved: John P. Simpson, *Acting Assistant Secretary (Enforcement and Operation)*.

Filed: February 25, 1981; Publication date: February 28, 1981.

[FR Doc. 51-1281] Filed: 1-25-81, 2:15 am; BILLING CODE 4810-25-4

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31 CFR PART 535

Iranian Assets Control Regulations

AGENCY: Office of Foreign Assets Control.

ACTION: Final Rule.

SUMMARY: The Office of Foreign Assets Control is amending the Iranian Assets Control Regulations. The purposes of the amendments are to add new directive provisions

and related definitions and interpretations; and to revoke certain trade and financial sanctions against Iran, in order to implement the agreements reached between the United States and Iran on January 19, 1981, and related agreements (the "agreements"), which commit the United States and Iran to take certain steps to free the American hostages and to solve certain claims between the United States and its nationals and Iran and its nationals.

EFFECTIVE DATE: January 19, 1981.

FOR FURTHER INFORMATION CONTACT: Raymond W. Konan, Chief Counsel, Office of Foreign Assets Control, Department of the Treasury, Washington, D.C. 20220, 202/376-0236.

SUPPLEMENTARY INFORMATION: The need for the amendments is (a) to implement Executive Order 12276, signed by the President on January 19, 1981, providing for the establishment of an Escrow Agreement and to implement Executive Orders 12277, 12278, 12279, 12280 and 12281 of the same date licensing, authorizing, directing and compelling: (1) the transfer by the Federal Reserve Bank of New York of all assets held by it for the Government of Iran and its entities ("Iran") to accounts held for the Federal Reserve Bank of New York at the Bank of England, (2) the transfer by overseas branches and offices of United States banks of all deposits and securities held by them for Iran to the account of the Federal Reserve Bank of New York at the Bank of England, (3) the transfer by domestic banks of all funds, securities and deposits held by them for Iran to the Federal Reserve Bank of New York, (4) the transfer by persons which are not banking institutions of funds or securities of Iran to the Federal Reserve Bank of New York and (5) the transfer by all persons subject to the jurisdiction of the United States of certain properties, not including funds and securities, owned by Iran, as directed by the

Government of Iran acting through its authorized agent; (b) to implement Executive Order 12282 of January 19, 1981, revoking various transactions involving Iran; and Executive Order 12283 of January 19, 1981, barring the prosecution of certain claims against Iran arising from specified occurrences and terminating any previously instituted judicial proceedings based upon such claims; and (c) to revoke miscellaneous provisions rendered unnecessary by the above described amendments. Certain of the amendments are also needed for purposes of prohibiting and nullifying the acquisition, by litigation or otherwise, of any rights or interests in the assets subject to the transfer directives which would interfere with the transfer of those assets and with implementation of the agreements between the United States and Iran.

The effect of the amendments is that prohibitions in the Regulations on the transfer of the assets covered by the directives, as well as rights and interests in the assets other than those of the Government of Iran or its entities will be removed so that the agreements can be effectuated. The amendments also have the effect of revoking miscellaneous sanctions against Iran; and of providing for the non-prosecution of certain claims against Iran.

Since the Regulations involve a foreign affairs function, the provisions of the Administrative Procedure Act, 5 U.S.C. 553, requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date are inapplicable.

The President has signed a series of executive orders implementing the agreements between the U.S. and Iran.

Executive Order 12276 of January 19, 1981, authorizes the Secretary of the Treasury to enter into and to license, authorize, direct and compel any appropriate official and/

or the Federal Reserve Bank of New York, as fiscal agent of the United States, to enter into escrow or related agreements under which certain money and other assets shall be transferred in implementation of the agreements between the United States and Iran. This Executive Order also authorizes the Secretary of the Treasury to license, authorize, direct and compel the Federal Reserve Bank of New York to receive certain money and other assets of the Government of Iran.

Executive Order 12277 of January 19, 1981, licenses, authorizes, directs and compels transfers into accounts at the Bank of England, and then into the escrow account, of assets of the Government of Iran held by the Federal Reserve Bank of New York.

Executive Order 12278 of January 19, 1981, licenses, authorizes, directs and compels the transfer of funds, securities and deposits of Iran, including interest at commercially reasonable rates, held by overseas branches and offices of United States banks to the account of the Federal Reserve Bank of New York at the Bank of England, to be held or transferred as directed by the Secretary of the Treasury. The assets transferred pursuant to this Executive Order are to be further transferred as provided for in the agreements.

Executive Order 12279 of January 19, 1981, licenses, authorizes, directs and compels the transfer of funds, securities and deposits of Iran, including interest at commercially reasonable rates, held by domestic branches or offices of banks which branches or offices are located within the United States to the Federal Reserve Bank of New York to be held or transferred as directed by the Secretary of the Treasury.

Executive Order 12280 of January 19, 1981, licenses, authorizes, directs and compels the transfer of funds and securities of Iran held by persons which are not banking institutions to the Federal Reserve Bank of New York to be held or transferred by the Secretary of the Treasury. This Executive Order applies to both overseas and domestically held assets.

Executive Order 12281 of January 19, 1981, licenses, authorizes, directs and compels the transfer by all persons subject to the jurisdiction of the United States of properties, not including funds and securities, owned by Iran, as directed by the Government of Iran acting through its authorized agent.

Executive Order 12282 of Janaury 19, 1981 revokes various sanctions, and prohibitions against transactions involving Iran.

Executive Order 12283 of Janaury 19, 1981, bars the prosecution of certain claims against Iran arising from specified occurrences and terminating any previously instituted judicial proceedings based upon such claims.

These amendments to the Iranian Assets Control Regulations implement the above-described executive orders and are summarized below.

1. *Direction to establish an escrow agreement.*

New § 535.210(a) licenses, authorizes, directs and compels the Federal Reserve Bank of New York as fiscal agent of the United States to enter into escrow or related agreements under which certain money and other assets will be transferred to the escrow account. In connection with the implementation of the escrow agreement. § 535.210(b) licenses, authorizes, directs and compels the Federal Reserve Bank of New York, as fiscal agent of the United States, to receive money and other assets in which Iran has an interest,

and to hold or to transfer those assets in such a manner as the Secretary of the Treasury deems necessary to fulfill the rights and obligations of the United States under the agreements between the United States and Iran.

2. *Direction involving transfers of assets held by the Federal Reserve Bank of New York.*

New § 535.211 licenses, authorizes, directs and compels the Federal Reserve Bank of New York to transfer to its account at the Bank of England, and subsequently to transfer to the escrow account, all gold bullion and other assets held by it for Iran when and in the manner directed by the Secretary of the Treasury.

3. *Direction to transfer assets held by overseas branches and offices of United States banks.*

New § 535.212 licenses, authorizes, directs and compels any overseas branch or office of a United States bank which, on or after 8:10 a.m. e.s.t., on November 14, 1979, has been or is in possession of funds or securities owned by Iran, or has carried or is carrying on its books deposits standing to the credit of Iran, to transfer such assets, including interest at commercially reasonable rates, to the account of the Federal Reserve Bank of New York at the Bank of England, to be held or transferred as directed by the Secretary of the Treasury. The funds, securities and deposits described in this section shall be further transferred as provided for in the agreements between the United States and Iran.

Section 535.212(b) provides that any bank subject to the jurisdiction of the United States that executed set-offs against deposits or securities held by them for Iran are authorized and directed to cancel such set-offs and to include in the directed transfer all assets subject to the set-offs, including interest at commercially reasonable rates.

4. *Direction to transfer assets held by domestic banks.*

New § 535.213 licenses, authorizes, directs and compels the transfer by domestic banks of all funds, securities and deposits held by them for Iran, including interest from November 14, 1979, at commercially reasonable rates, to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury.

5. *Direction to transfer other financial assets.*

New § 535.214 licenses, authorizes, directs and compels persons subject to the jurisdiction of the United States which are not banking institutions to transfer all funds or securities of Iran in their possession or control to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury. However, such transfers are not required until certain disputes as to Iran's entitlement are resolved.

6. *Direction to transfer other properties.*

New § 535.215 licenses, authorizes, directs and compels all persons subject to the jurisdiction of the United States to transfer properties, not including funds and securities, which are owned by Iran and are in the possession or control of such persons as directed by the Government of Iran, acting through its authorized agent. (New § 535.333 defines the term ''properties'' as used in § 535.215.)

7. *Certain claims against Iran barred.*

New § 535.216 bars persons subject to the jurisdiction of the United States from prosecuting, in any court within the United States or elsewhere, any claims against the Government of Iran arising out of certain specified events. These events relate to the seizure and detention of the hostages, injury to United States property or property of United States nationals within the United States Embassy compound in

Tehran and injury to United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.

Section 535.216 also bars the prosecution of such claims in any court within the United States by persons who are not United States nationals.

Section 535.216 bars further action in any previously instituted judicial proceedings which are based upon any of the above-described claims and provides that all such proceedings shall be terminated. In addition, § 535.216 prohibits the enforcement of any judicial order issued in the course of such proceedings.

8. *Prohibitions with respect to assets subject to transfer directives; Nullification of attachments and similar remedies; Prohibitions on judicial action.*

New § 535.218(a) revokes and withdraws all licenses and authorizations for acquiring or exercising any right, power or privilege by court order, attachment or otherwise, with respect to any of the properties covered by the directives in §§ 535.211 to 535.215. New § 535.218(b) provides that all rights, powers and privileges relating to the assets described in §§ 535.211 to 535.215 which derive from any attachment, injunction, other like proceedings or process, or other action in any litigation after November 14, 1979, at 8:10 a.m., e.s.t., including those derived from § 535.504 of the Regulations, whether acquired by court order or otherwise, are nullified. The nullification does not apply to rights, powers or privileges of Iran. New § 535.218(c) prohibits the acquisition or exercise of any right, power or privilege with respect to any property (and any income earned thereon) referred to in the directives in §§ 535.211 to 535.215. New § 535.218(d) provides that the prohibition

on the acquisition of rights contained in § 535.218(c) does not apply to the Government of Iran, its agencies, instrumentalities or controlled entities. New § 535.218(e) provides that § 535.218 does not revoke or withdraw certain specific licenses, issued prior to January 19, 1981, until April 15, 1981.

9. *Compliance with this part a legal acquittance and discharge of the obligation of any person.*

New § 535.219, pursuant to Section 201(a)(3) of the International Emergency Economic Powers Act, states that compliance in good faith with the directive provisions in §§ 535.210 to 535.215 or any other orders, regulations, instructions or directions which license, authorize, direct or compel the transfer of assets referred to in those sections shall, to the extent thereof, be a full acquittance and discharge for all purposes of the obligations of the person making the same. No person shall be held liable in any United States court for such good faith compliance.

10. *Timing of transactions.*

New § 535.220 provides that transfers of overseas bank assets required by § 535.212 shall be executed no later than 6:00 a.m., e.s.t., January 20, 1981.

11. *Compliance with other directive provisions.*

New § 535.221(a) provides that compliance with the directive provisions of §§ 535.213 and 535.214 pertaining to domestic bank assets and other financial assets requires that persons affected by these directives-implement them as soon as reasonably practicable. New § 535.221(b) states the U.S. policy until further notice, not to seek sanctions against any party who does not make any transfer required by §§ 535.213 to 535.215 while challenges to the authority of the United States to order the transfers are pending in U.S. courts.

12. *Suspension of claims eligible for Claims Tribunal.*

New § 535.222 provides (a) that all claims which may be presented to the Iran-United States Claims Tribunal provided for in the agreements between the United States and Iran and all claims for equitable or other relief in connection with such claims, are suspended, (b) that the section does not prohibit assertions of defense, set-off or counterclaim in any pending or future judicial proceeding commenced by Iran, (c) that the section does not preclude actions to toll periods of limitations for commencement of action, (d) that dismissal for want of prosecution is not required, (e) that the suspension shall terminate if the Claims Tribunal determines it lacks jurisdiction, (f) that a determination on the merits by the Tribunal shall operate as a final resolution and discharge of the claim, provided that full payment of the award is paid, and (g) that the section does not apply to certain claims concerning standby letters of credit, performance or payment bonds or other similar instruments.

13. *Definition of "properties."*

New § 535.333 defines "properties" as used in § 535.215 to include only uncontested and non-contingent liabilities and property interests of Iran. Specifically excluded are (1) funds, (2) securities, (3) bank deposits, and (4) obligations under standby letters of credit or similar instruments. Properties are not Iranian properties owned by Iran unless necessary obligations, charges and fees are discharged.

14. *Definition of an act of the Government of Iran.*

New § 535.334 defines an act of the Government of Iran as including any acts ordered, authorized, allowed or ratified by Iran or its entities.

15. *Definition of ''claim arising out of events in Iran.''*

New § 535.335 states that a claim is one arising out of events in Iran of the type specified in § 535.216 only if such event is the specific act that is the basis of the claim.

16. *Definition of ''funds.''*

New § 535.337 defines ''funds'' as used in this part to mean currency and coin, trust, escrow and special funds held by non-banking institutions.

17. *Status of Central Bank of Iran.*

New § 535.433 provides that, for purposes of this part, the Central Bank of Iran (Bank Markazi Iran) is an agency, instrumentality and controlled entity of the Government of Iran.

18. *Effect on other authorities.*

New § 535.437 states that nothing in this part relieves any persons from the necessity of securing licenses or other authorizations as required by the Secretary of State, the Secretary of Commerce or other relevant agency prior to executing the transactions authorized or directed by this part.

19. *Standby letters of credit.*

New § 535.438 states that nothing contained in §§ 535.212, 535.213 and 535.214 or in any other provision, revocation or amendment affects the prohibition in § 535.568 on the payment under certain standby letters of credit, performance or payment bonds and similar obligations. Section 535.568(a) prohibits the payment under a standby letter of credit into a blocked account provided that the account party avails itself of the specific licensing procedure to establish a blocked account on its books. The prohibition and the procedure remain in effect. The section also provides that

the term ''funds and securities'' as used in this part excludes the substitute blocked accounts established under § 535.568 relating to standby letters of credit, performance or payment bonds and similar obligations.

20. *Commercially reasonable interest rates.*

New § 535.440 provides that the meaning of the term ''commercially reasonable rates'' depends on the particular circumstances of the deposit.

21. *Exclusion of pre-judgment attachments and similar proceedings from general license for judicial proceedings.*

The general license in § 535.504 for judicial proceedings is amended to exclude pre-judgment attachments and other proceedings of similar or analogous effect with respect to property subject to §§ 535.211 though 535.215 and reference is made to the claims suspension provisions of § 535.222.

22. *Authorization for new transactions.*

New § 535.579 authorizes new transactions involving property of Iran. Transactions involving standby letters of credit, performance or payment bonds and similar obligations remain subject to the provisions of § 535.568. The section also highlights that attachment, injunction and similar orders are prohibited with respect to property not blocked on January 19, 1981, which is or becomes subject to U.S. jurisdiction for the express purpose of settling claims against Iran.

23. *Reports on transfers of other assets.*

Section 535.618 provides that any person failing to transfer property as directed by Iran is required to submit a brief report to the Office of Foreign Assets Control explaining why the property was not transferred.

24. *Revocation of general license for overseas set-offs.*

Section 535.902 is amended to revoke the general license in paragraph (a) authorizing overseas set-offs and by adding paragraph (c) to provide that for purposes of this section, set-offs include combinations of accounts or any similar actions.

25. *Revocation of sanctions, prohibitions and obsolete provisions.*

These amendments revoke various sanctions and prohibitions against transactions involving Iran, including certain prohibitions against imports from Iran, financial transactions with Iran, exports to Iran, and travel-related transactions. They also revoke miscellaneous definitions, interpretations and statements of licensing policy that are obsolete as the result of the above amendments.

Additional sections of the existing regulations may be revoked and additional provisions may be added, as appropriate.

31 CFR Part 535 is amended as follows:

1. Section 535.210 is added as follows:

§ 535.210 Direction for establishing an escrow agreement.

(a) The Federal Reserve Bank of New York, as fiscal agent of the United States, is licensed, authorized, directed and compelled to enter into escrow and related agreements under which certain money and other assets shall be credited by the Bank of England to escrow accounts.

(b) The Federal Reserve Bank of New York is licensed, authorized, directed and compelled, as fiscal agent of the United States, to receive certain money and other assets in which Iran or its agencies, instrumentalities or controlled entities have an interest and to hold or transfer such money and other assets, and any earnings or interest payable

thereon, in such manner and at such times as the Secretary of the Treasury deems necessary to fulfill the rights and obligations of the United States under the Declaration of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, and the Undertakings of the Government of the United States of America and the Government of Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, and the escrow and related agreements described in paragraph (a) of this section. Such money and other assets may be invested, or not, at the discretion of the Federal Reserve Bank of New York, as fiscal agent of the United States.

2. Section 535.211 is added as follows:

§ 535.211 Direction involving transfers by the Federal Reserve Bank concerning certain Iranian property.

The Federal Reserve Bank of New York is licensed, authorized, directed and compelled to transfer to its account at the Bank of England, and subsequently to transfer to accounts in the name of the Central Bank of Algeria as Escrow Agent at the Bank of England that are established pursuant to an escrow and related agreements approved by the Secretary of the Treasury, all gold bullion, together with all other assets in its custody (or the cash equivalent thereof), of Iran or its agencies, instrumentalities or controlled entities. Such transfers, and whatever further related transactions are deemed appropriate by the Secretary of the Treasury, shall be executed when and in the manner directed by the Secretary of the Treasury.

3. Section 535.212 is added as follows:

§ 535.212 Direction to transfer property in which Iran or an Iranian entity has an interest by branches and offices of United States banks located outside the United States.

(a) Any branch or office of a United States bank or subsidiary thereof, which branch, office or subsidiary is located outside the territory of the United States, and which, on or after 8:10 a.m., e.s.t., on November 14, 1979, (1) has been or is in possession of funds or securities legally or beneficially owned by the Government of Iran or its agencies, instrumentalities, or controlled entities, or (2) has carried or is carrying on its books deposits standing to the credit of or beneficially owned by such government, its agencies, instrumentalities or controlled entities, is licensed, authorized, directed and compelled to transfer such funds, securities and deposits, held on January 19, 1981, including interest from November 14, 1979, at commercially reasonable rates, to the account of the Federal Reserve Bank of New York, as fiscal agent of the U.S., at the Bank of England, to be held or transferred as directed by the Secretary of the Treasury. The funds, securities and deposits described in this section shall be further transferred as provided for in the Declarations of the Government of the Democratic and Popular Republic of Algeria and the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration.

(b) Any banking institution subject to the jurisdiction of the United States that has executed a set-off on or after 8:10 a.m., e.s.t., November 14, 1979, against Iranian funds, securities or deposits referred to in paragraph (a) of this section is hereby licensed, authorized, directed and compelled to cancel such set-off and to transfer all funds, securities and deposits which have been subject to such set-off, including interest from November 14, 1979, at com-

mercially reasonable rates, pursuant to the provisions of paragraph (a) of this section.

4. Section 535.213 is added as follows:

§ 535.213 Direction involving property held by offices of banks in the U.S. in which Iran or an Iranian entity has an interest.

(a) Any branch or office of a bank, which branch or office is located within the United States and is, on the effective date of this section, either (1) in possession of funds or securities legally or beneficially owned by the Government of Iran or its agencies, instrumentalities or controlled entities, or (2) carrying on its books deposits standing to the credit of or beneficially owned by such government or its agencies, instrumentalities or controlled entities, is licensed, authorized, directed and compelled to transfer such funds, securities and deposits, held on January 19, 1981, including interest from November 14, 1979, at commercially reasonable rates, to the Federal Reserve Bank of New York, as fiscal agent of the U.S., to be held or transferred as directed by the Secretary of the Treasury.

(b) Transfers of funds, securities or deposits under paragraph (a) of this section shall be in accordance with the provisions of § 535.221 of this part.

5. Section § 535.214 is added as follows:

§ 535.214 Direction involving other financial assets in which Iran or an Iranian entity has an interest held by any person subject to the jurisdiction of the United States.

(a) Any person subject to the jurisdiction of the United States which is not a banking institution and is on January 19, 1981, in possession or control of funds or securities of Iran or its agencies, instrumentalities or controlled entities is licensed, authorized, directed and compelled to transfer

such funds or securities to the Federal Reserve Bank of New York, as fiscal agent of the U.S., to be held or transferred as directed by the Secretary of the Treasury. However, such funds and securities need not be transferred until any disputes (not relating to any attachment, injunction or similar order) as to the entitlement of Iran and its entities to them are resolved.

(b) Transfers of funds, securities or deposits under paragraph (a) of this section shall be in accordance with the provisions of § 535.221 of this part.

(c) Any funds, securities or deposits subject to a valid attachment, injunction or other like proceeding or process not affected by § 535.218 need not be transferred as otherwise required by this section.

6. Section 535.215 is added as follows:

§ 535.215 Direction involving other properties in which Iran or an Iranian entity has an interest held by any person subject to the jurisdiction of the United States.

All persons subject to the jurisdiction of the United States in possession or control of properties, as defined in § 535.333 of this part, not including funds and securities owned by Iran or its agencies, instrumentalities or controlled entities are licensed, authorized, directed and compelled to transfer such properties held on January 19, 1981 as directed after that date by the Government of Iran, acting through its authorized agent. Except where specifically stated, this license, authorization and direction does not relieve persons subject to the jurisdiction of the United States from existing legal requirements other than those based upon the International Emergency Economic Powers Act.

7. Section 535.216 is added as follows:

§ 535.216 Prohibition against prosecution of certain claims.

(a) Persons subject to the jurisdiction of the United States are prohibited from prosecuting in any court within the United States or elsewhere, whether or not litigation was commenced before or after January 19, 1981, any claim against the Government of Iran arising out of events occurring before January 19, 1981 relating to:

(1) The seizure of the hostages on November 4, 1979;

(2) The subsequent detention of such hostages;

(3) Injury to United States property or property of United States nationals within the United States Embassy compound in Tehran after November 3, 1979; or

(4) Injury to United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.

(b) Any persons who are not United States nationals are prohibited from prosecuting any claim described in paragraph (a) of this section in any court within the United States.

(c) No further action, measure or process shall be taken after the effective date of this section in any judicial proceeding instituted before the effective date of this section which is based upon any claim described in paragraph (a) of this section, and all such proceedings shall be terminated.

(d) No judicial order issued in the course of the proceedings described in paragraph (c) of this section shall be enforced in any way.

8. Section 535.218 is added as follows:

§ 535.218 Prohibitions and nullifications with respect to property described in §§ 535.211, 535.212, 535.213, 535.214 and 535.215.

(a) All licenses and authorizations for acquiring or exercising any right, power or privilege, by court order,

attachment or otherwise, including the license contained in § 535.504, with respect to the property described in §§ 535.211, 535.212, 535.213, 535.214 and 535.215 are revoked and withdrawn.

(b) All rights, powers and privileges relating to the property described in §§ 535.211, 535.212, 535.213, 535.214 and 535.215 and which derive from any attachment, injunction, other like proceedings or process, or other action in any litigation after November 14, 1979 at 8:10 a.m. e.s.t., including those derived from § 535.504, other than rights, powers and privileges of the Government of Iran and its agencies, instrumentalities and controlled entities, whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power or privilege are hereafter barred from exercising the same.

(c) All persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power or privilege, whether by court order or otherwise, with respect to property (and any income earned thereon) referred to in §§ 535.211, 535.212, 535.213, 535.214 and 535.215.

(d) The prohibitions contained in paragraph (c) of this section shall not apply to Iran, its agencies, instrumentalities or controlled entities.

(e) This section does not revoke or withdraw specific licenses authorizing the operation of blocked accounts which were issued prior to January 19, 1981 and which do not relate to litigation. Such licenses are revoked as of April 15, 1981, unless extended by further general or specific license.

9. Section 535.219 is added as follows:

§ 535.219 Discharge of obligation by compliance with this part.

Compliance with §§ 535.211, 535.212, 535.213, 535.214 and 535.215, or any other orders, regulations, instructions or directions issued pursuant to this part licensing, authorizing, directing or compelling the transfer of the assets described in those sections, shall, to the extent thereof, be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, such orders, regulations, instructions or directions.

10. Section 535.220 is added as follows:

§ 535.220 Timing of transfers required by § 535.212.

Transfers required by § 535.212 to the account of the Federal Reserve bank of New York, as fiscal agent of the U.S. at the Bank of England shall be executed no later than 6 a.m., e.s.t., January 20, 1981, when the banking institution had knowledge of the terms of Executive Order 12278 of January 19, 1981.

11. Section 535.221 is added as follows:

§ 535.221 Compliance with directive provisions.

(a) Compliance with the directive provisions of §§ 535.213 and 535.214 requires that persons affected by these sections shall implement the directives as soon as reasonably practicable.

(b) Until the Secretary of the Treasury determines that the authority of the United States to order these transfers has been the subject of a definitive legal ruling, the United States Government will not seek to impose civil or criminal sanctions on any party who does not make the transfers

required by §§ 535.213, 535.214 and 535.215 and Executive Orders 12279-81 of January 19, 1981.

(c) Transfers of deposits or funds required by §§ 535.213 and 535.214 of this part shall be effected by means of wire transfer to the Federal Reserve Bank of New York for credit to the following account; Federal Reserve Bank of New York as fiscal agent of the United States. Special Deposit Account.

(d) Securities to be transferred as required by §§ 535.213 and 535.214 of this part must be delivered to the Federal Reserve Bank of New York in fully transferable form, accompanied by all necessary transfer documentation, *e.g.*, stock or bond powers, powers of attorney, and also accompanied by instructions to deposit such securities to the following account: Federal Reserve Bank of New York, as fiscal agent of the United States, Special Custody Account.

(1) Securities which are in book-entry, form shall be transferred by wire transfer to the Federal Reserve Bank of New York for credit to the account named in paragraph (d) of this section.

(2) Definitive securities which are in bearer or registered form shall be hand delivered or forwarded by registered mail, insured, to the Federal Reserve Bank of New York. Safekeeping Department.

(e) If a security in which Iran or an Iranian entity has an interest is evidenced by a depositary receipt or other evidence of a security, the legal owner of such security shall arrange to have it placed in registered form in the name of Iran or the Iranian entity having an interest in such security, as appropriate, and transferred pursuant to paragraph (d)(2) of this section.

(f) Securities in which Iran or an Iranian entity has an interest that are held in the name of a nominee must be re-

registered in the name of Iran or the Iranian entity having an interest in such security, as appropriate, and transferred pursuant to paragraph (d)(2) of this section.

(g) Any person delivering a security or securities to the Federal Reserve Bank of New York under paragraph (d) shall provide the Bank at least two business days prior written notice of such delivery, specifically identifying the sending person, the face or par amount and type of security, and whether the security is in bearer, registered or book entry form.

12. Section 535.222 is added as follows:

§ 535.222 Suspension of claims eligible for Claims Tribunal.

(a) All claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, dated January 19, 1981, and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the Tribunal. During the period of this suspension, all such claims shall have no legal effect in any action now pending in any court in the United States, including the courts of any state and any locality thereof, the District of Columbia and Puerto Rico, or in any action commenced in any such court after the effective date of this section.

(b) Nothing in paragraph (a) of this section shall prohibit the assertion of a defense, set-off or counterclaim in any pending or subsequent judicial proceeding commenced by the Government of Iran, any political subdivision of Iran,

or any agency, instrumentality or entity controlled by the Government of Iran or any political subdivision thereof.

(c) Nothing in this section precludes the commencement of an action after the effective date of this section for the purpose of tolling the period of limitations for commencement of such action.

(d) Nothing in this section shall require dismissal of any action for want of prosecution.

(e) Suspension under this section of a claim or a portion thereof submitted to the Iran-United States Claims Tribunal for adjudication shall terminate upon a determination by the Tribunal that it does not have jurisdiction over such claim or portion thereof.

(f) A determination by the Iran-United States Claims Tribunal on the merits that a claimant is not entitled to recover on a claim or part thereof shall operate as a final resolution and discharge of such claim or part thereof for all purposes. A determination by the Tribunal that a claimant shall have recovery on a claim or part thereof in a specified amount shall operate as a final resolution and discharge of such claim or part thereof for all purposes upon payment to the claimant of the full amount of the award including any interest awarded by the Tribunal.

(g) Nothing in this section shall apply to any claim concerning the validity or payment of a standby letter of credit, performance or payment bond or other similar instrument.

(h) The effective date of this section is February 24, 1981.

13. Section 535.333 is added as follows:

§ 535.333 Properties.

(a) The term ''properties'' as used in § 535.215 includes all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instru-

mentalities or controlled entities, including debts. It does not include bank deposits or funds and securities. It also does not include obligations under standby letters of credit or similar instruments in the nature of performance bonds, including accounts established pursuant to § 535.568.

(b) Properties are not Iranian properties or owned by Iran unless all necessary obligations, charges and fees relating to such properties are paid and liens against such properties (not including attachments, injunctions and similar orders) are discharged.

(c) Liabilities and property interests may be considered contested if the holder thereof reasonably believes that a court would not require the holder, under applicable law to transfer the asset by virtue of the existence of a defense, counterclaim, set-off or similar reason. For purposes of this paragraph, the term ''holder'' shall include any person who possesses the property, or who, although not in physical possession of the property, has, by contract or otherwise, control over a third party who does in fact have physical possession of the property. A person is not a ''holder'' by virtue of being the beneficiary of an attachment injunction or similar order.

(d) Liabilities and property interests shall not be deemed to be contested solely because they are subject to an attachment, injunction or other similar order.

14. Section 535.334 is added as follows:

§ 535.334 Act of the Government of Iran.

For purposes of § 535.218, an act of the Government of Iran, includes any acts ordered, authorized, allowed, approved, or ratified by the Government of Iran, its agencies, instrumentalities or controlled entities.

15. Section 535.335 is added as follows:

§ 535.335 Claim arising out of events in Iran.

For purposes of § 535.216, a claim is one ''arising out of events'' of the type specified only if such event is the specific act that is the basis of the claim.

16. Section 535.337 is added as follows:

§ 535.337 Funds.

For purposes of this part, the term ''funds'' shall mean monies in trust, escrow and similar special funds held by non-banking institutions, currency and coins. It does not include accounts created under § 535.568.

17. Section 535.433 is added as follows:

§ 535.433 Central Bank of Iran.

The Central Bank of Iran (Bank Markazi Iran) is an agency, instrumentality and controlled entity of the Government of Iran for all purposes under this part.

18. Section 535.437 is added as follows:

§ 535.437 Effect on other authorities.

Nothing in this part in any way relieves any persons subject to the jurisdiction of the United States from securing licenses or other authorizations as required from the Secretary of State, the Secretary of Commerce or other relevant agency prior to executing the transactions authorized or directed by this part. This includes licenses for transactions involving military equipment.

19. Section 535.438 is added as follows:

§ 535.438 Standby letters of credit, performance or payment bonds and similar obligations.

Nothing contained in §§ 535.212, 535.213 and 535.214 or in any other provision or revocation or amendment of any provision in this part affects the prohibition in § 535.201

and the licensing procedure in § 535.568 relating to certain standby letters of credit, performance bonds and similar obligations. The term "funds and securities" as used in this part does not include substitute blocked accounts established under section 535.568 relating to standby letters of credit, performance or payment bonds and similar obligations.

20. Section 535.440 is added to read as follows:

§ 535.440 Commercially reasonable interest rates.

For purposes of §§ 535.212 and 535.213, what is meant by "commercially reasonable rates" depends on the particular circumstances of the deposit. Where, for example, a deposit has in fact operated as a demand account under Treasury license, it would be appropriate to treat the deposit for purposes of §§ 535.212 and 535.213 as a non-interest-bearing account.

21. Section 535.504 is revised to read as follows:

§ 535.504 Certain judicial proceedings with respect to property of Iran or Iranian entities.

(a) Subject to the limitations of paragraphs (b) and (c) of this section and § 535.222, judicial proceedings are authorized with respect to property in which on or after 8:10 a.m., e.s.t., November 14, 1979, there has existed an interest of Iran or an Iranian entity.

(b) This section does not authorize or license:

(1) Any pre-judgment attachment or any other proceeding of similar or analogous effect pertaining to any property (and any income earned thereon) subject to the provisions of § 535.211, 535.212, 535.213, 535.214 or 535.215 on January 19, 1981, including, but not limited to, a temporary restraining order or preliminary injunction, which operates as a restraint on property, for purposes of holding it within the jurisdiction of a court, or otherwise:

(2) Any payment or delivery out of a blocked account based upon a judicial proceeding, pertaining to any property subject to the provisions of §§ 535.211, 535.212, 535.213, 535.214 or 535.215 on January 19, 1981:

(c) A judicial proceeding is not authorized by this section if it is based on transactions which violated the prohibitions of this part.

22. Section 535.579 is added as follows:

§ 535.579 Authorization of new transactions concerning certain Iranian property.

(a) Transactions involving property in which Iran or an Iranian entity has an interest are unauthorized where:

(1) The property comes within the jurisdiction of the United States or into the control or possession of any person subject to the jurisdiction of the United States after January 19, 1981, or

(2) The interest in the property of Iran or an Iranian entity (e.g. exports consigned to Iran or an Iranian entity) arises after January 19, 1981.

(b) Transactions involving standby letters of credit, performance or payment bonds and similar obligations, entered into prior to January 20, 1981, described in § 535.568 remain subject to the prohibitions and procedures contained in §§ 535.201 and 535.568.

(c) Property not blocked under § 535.201 as of January 19, 1981, in which the Government of Iran or an Iranian entity has an interest, which after that date is or becomes subject to the jurisdiction of the United States or comes within the control or possession of a persons subject to the jurisdiction of the United States for the express purpose of settling claims against Iran or Iranian entities, is excluded from any authorization in this part for any attachment, in-

junction or other order of similar or analogous effect and any such attachment, injunction or order is prohibited by §§ 535.201 and 535.203.

23. Section 535.618 is added to read as follows:

§ 535.618 Report of contested property.

(a) *Requirement for reports*. Reports are required to be filed within 15 days of receipt of a direction from Iran to transfer any interests in property claimed or believed to be an interest of Iran which was blocked by the Iranian Assets Control Regulations if the party receiving the direction to transfer has not transferred such claimed interest in property.

(b) *Who must report*. Reports must be filed by every person subject to the jurisdiction of the United States who does not transfer any interest or claimed interest in property described in paragraph (a) of this section wihtin 15 days of a direction from Iran to transfer it.

(c) *Contents of report*. Each report shall contain the following information.

(1) Name and address of entity making the report.

(2) Name of person and entity directing the transfer.

(3) Date of the direction and date of its receipt.

(4) Description of the interest or claimed interest in property directed to be transferred.

(5) Statement or estimate of value of the interest or claimed interest in property.

(6) Explanation why property was not transferred as directed.

(7) Statement of any planned actions with respect to the interest or claimed interest in the property described.

(d) *Filing*, Reports shall be prepared in triplicate. Two copies shall be sent in a set to Unit 617. Office of Foreign Assets Control, Department of the Treasury, Washington,

D.C. 20220. The third copy must be retained with the reporter's records.

(e) *Confidentiality of reports.* Reports under this section are regarded as privileged and confidential.

24. Section 535.902 is revised to read as follows:

§ 535.902 Set-offs by U.S. owned or controlled firms abroad.

(a) Branches and subsidiaries in foreign countries of persons subject to the jurisdiction of the United States are licensed to set-off their claims against Iran or Iranian entities by debit to blocked accounts held by them for Iran or Iranian entities.

(b) The general license in paragraph (a) of this section is revoked as of January 19, 1981.

(c) For purposes of this section, set-offs include combinations of accounts and any similar actions.

25. Part 535 is amended by the revocation and removal of sections 535.204, 535.206, 535.207, 535.209, 535.331, 535.332, 535.418, 535.419, 535.422, 535.423, 535.424, 535.425, 535.426, 535.427, 535.428, 535.429, 535.430, 535.431, 535.432, 535.550, 535.562, 535.563, 535.572, 535.574, 535.575, 535.577, 535.578, 535.603.

§ 535.204 [Removed]

§ 535.206-207 [Removed]

§ 535.209 [Removed]

§ 535.331 [Removed]

§ 535.332 [Removed]

§ 535.418 [Removed]

§ 535.419 [Removed]

§ 535.422-432 [Removed]

§ 535.550 [Removed]

§ 535.562 [Removed]

§ 535.563 [Removed]

§ 535.572 [Removed]

§ 535.574 [Removed]

§ 535.575 [Removed]

§ 535.577 [Removed]

§ 535.578 [Removed]

§ 535.603 [Removed]

Dated: February 24, 1981.

Dennis M. O'Connell, *Director.*

Approved: John P. Simpson.

Acting Assistant Secretary, Enforcement and Operations.

Verification.

State of California, County of .....

I, the undersigned, say:

I have read the foregoing Complaint for Injunctive and Declaratory Relief and know its contents.

I am a partner Plaintiff Dames & Moore a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

Executed on April 27, 1981, at Los Angeles California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Robert M. Perry,

Robert M. Perry

Motion to Dismiss Dames & Moore's Complaint for Failure to State a Claim Upon Which Relief May Be Granted, May 14, 1981.

United States District Court, Central District of California.

Dames & Moore, Plaintiff, v. Donald T. Regan, The Secretary of the United States of America, and The United States of America, Defendants.

Daniel, Mann, Johnson, & Mendenhall, a California corporation, Plaintiff, v. Donald T. Regan, The Secretary of The Treasury of The United States of America, and The United States of America, Defendants.

No. CV 81-2064 LEW (Px),
No. CV 81-1101 LEW (Px).

MOTION TO DISMISS DAMES & MOORE'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Dames & Moore has filed suit against the United States claiming that the actions of Presidents Carter and Reagan implementing the agreements with Iran, which secured the release of 52 American hostages, are unconstitutional. Because the challenged Presidental actions are lawful, Dames & Moore's complaint should be dismissed pursuant to Rule 12(b)(6), F.R.Civ.P., for failure to state a claim.

The accompanying memorandum of law explains the basis for the motion and responds to Dames & Moore's amicus curiae brief in support of Daniel, Mann, Johnson & Mendenhall's motion for a preliminary injunction. Accordingly,

the United States moves for an order dismissing Dames & Moore's complaint for failure to state a claim.

Respectfully submitted,

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Memorandum in Support of Defendants' Motion to Dismiss and in Opposition to Dames & Moore's Brief as Amicus Curiae.

United States District Court, Central District of California.

Dames & Moore, Plaintiff, v. Donald T. Regan, The Secretary of the Treasury of the United States of America, and The United States of America, Defendants.

Daniel, Mann, Johnson, & Mendenhall, a California corporation, Plaintiff, v. Donald T. Regan, the Secretary of The Treasury of the United States of America and The United States of America, Defendants.

No. CV 81-2064 LEW (Px), No. CV 81-1101 LEW (Px).

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO DAMES & MOORE'S BRIEF AS AMICUS CURIAE.

Introduction

Dames & Moore has filed a complaint against the United States alleging that the Presidential actions implementing the agreements with Iran are unconstitutional. Dames & Moore filed the same memorandum (''D & M Memo.'') in support of its motion for a preliminary injunction and as amicus curiae in support of Daniel, Mann, Johnson & Mendenhall's motion for a preliminary injunction in C.A. No. 81-1101 LEW (Px). The two actions have been consolidated before this Court which also has the underlying contractural actions against various Iranian defendants before it.

President Carter froze Iranian assets through Executive Order No. 12170 on November 14, 1979. Subsequent Treasury regulations licensed suits and pre-judgment attachments, where otherwise authorized, against Iranian entities. This license was revocable and did not authorize judgments. 31

C.F.R. 535.805; 535.504; 535.418. Pursuant to this limited, revocable license, Dames & Moore filed a commercial claim against numerous Iranian defendants. *Dames & Moore v. Atomic Energy Orangization of Iran, et al.*, C.A. No. CV-79-04918-LEW.

On January 19, 1981, Iran and the United States peacefully resolved many of their outstanding disputes through a series of international agreements. This resolution included the settlement of most claims against Iran through an international arbitral mechanism. President Carter issued ten Executive orders implementing the agreements. President Reagan assumed office the next day. He announced an intensive review of the agreements with Iran. Accordingly, the United States sought to stay all proceedings against Iran until February 26, 1981, at which time the United States intended to file a major Statement of Interest setting forth the position of the United States.

On February 18, 1981, however, this Court granted Dames & Moore summary judgment against the Atomic Energy Organization of Iran and the Islamic Republic of Iran. This court, of course, did not have President Reagan's Executive Order No. 12294, which suspended claims which may be presented to the arbitral tribunal, or any briefing by the United States supporting the validity of these Presidential actions before it at the time it signed the brief order of February 18, 1981. Dames & Moore is currently seeking to execute upon this unlicensed judgment. Absent a prompt ruling by this Court upholding the validity of the Presidential actions, the United States may well be thrown in breach of its international commitments.

ARGUMENT

Summary

Dames & Moore does not directly challenge the President's long-exercised power to settle claims. Dames &

Moore's challenge to the claims settlement power rests upon the theory that passage of the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et seq.* (''FSIA''), *implicitly* repealed the President's claims settlement powers. Neither the language nor the legislative history of the FSIA support this extraordinary construction of the FSIA. The assault on the President's claim settlement powers also relies on two insubstantial arguments. The President did not purport to deprive United States courts of jurisdiction and did not confer sovereign immunity upon Iranian defendants.

The President's authority to return Iran's property is an essential concomitant of the claims settlement power. Moreover, the President's power is at its maximum here because it has been supplemented by the Congressional delegation of power over interests in foreign property during a declared national emergency under the International Emergency Economic Powers Act, 50 U.S.C. 1702 *et seq.* (''IEEPA'').

The ''taking'' claim is both premature and without merit. Even if Dames & Moore were ultimately to suffer a ''loss'' as a result of the settlement, such a ''loss'' is now completely speculative and would ultimately be a matter to be decided, if at all, by the Court of Claims. Claimants have, overall, benefited from the freeze and agreements with Iran. In any event, no valid ''taking'' claim exists in connection with an international claims settlement and the revocation of plaintiffs' revocable licenses for suit and attachment.

I. THE PRESIDENT HAS THE POWER TO SETTLE INTERNATIONAL CLAIMS.

A. The President Has Such Power Under Article II.

Dames & Moore concedes that the President has long had the power to settle international claims. D & M Memo. at 30. The concesssion is grudging; Dames & Moore does not acknowledge that the Supreme Court is among the ''several

courts'' which have repeatedly upheld the Article II claims settlement power. *Id.* ''That the President's control of foreign relations includes the settlement of claims is indisputable.'' *United States v. Pink*, 315 U.S. 203, 240 (1942) (Frankfurter, J., concurring). *See Security Pacific National Bank v. Government and State of Iran, et al.*, No. CV 79-4661-RVK (Gx) (C.D Cal. April 30, 1981); *Chas. T. Main Int. v. United States, et al.*, C.A. No. 81-315-C (D. Mass. March 17, 1981); *Unidyne Corporation v. Government of Iran, et al.*, C.A. No. 80-1029-A (E.D. Va. March 30, 1981); *Blount Brothers Corp., et al. v. Government of Iran, et al.*, C.A. No. C 79-1442 V (W.D. Wash. May, 1981) (slip opinion will be provided when received). Dames & Moore does not contest the principle that Executive agreements and implementing executive orders and regulations, if otherwise constitutional, become part of the law of the land, *See United States v. Pink, supra.* The President exercised his Article II power to settle claims, and that action became part of the law of the land which this Court applies in considering plaintiffs' suits. *Unidyne Corp., supra.* Slip Op. at 7; *Security Pacific National Bank, supra,* Slip. Op. at 36. On the merits, these suits should be dismissed because the underlying claims, as a matter of substantive law, are being settled through international arbitration. The Supreme Court has ruled that a claims settlement must be applied by the judiciary in these circumstances even if the plaintiff's claim was before the judiciary prior to the settlement and the claimant received nothing from the settlement. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). The extensive dicta in *National Airmotive Corp. v. Government & State of Iran*, 449 F. Supp. 401 (D.D.C. 1980), a decision which merely dealt with a request for a stay during the hostage crisis, is irrelevant because it does not deal with a claims settlement.

The preliminary injunction granted in *Electronic Data Systems Corp. Iran v. Social Security Organization of the Government of Iran, et al.*, No. CA 3-79-0218-F (N.D. Tex. Feb. 12, 1981) (''EDS''), rests upon the erroneous assumption that the President was divesting that court of jurisdiction. The injunction was granted before President Reagan's Executive Order No. 12,294 (Feb. 24, 1981) made it clear that the President was doing no such thing. Moreover, the United States was unable to brief the merits of EDS' challenges to the President's authority because President Reagan had not completed his review of the agreements with Iran. Indeed, Judge Porter noted that his conclusions were merely preliminary because of this latter fact. *EDS, supra,* Slip Op. at 29. Similarly, this Court's entry of a judgment in favor of Dames & Moore against certain Iranian defendants on February 18, 1981 preceded President Reagan's Executive Order and the February 26, 1981 Statement of Interest of the United States.

Dames & Moore argues that the executive orders and regulations implementing the agreements with Iran are unconstitutional, and, therefore, not part of the law of the land applied by the courts. D & M Memo. at 28. Dames & Moore argues that the actions of Presidents Carter and Reagan are unlawful because they purportedly violate the separation of powers doctrine, the FSIA, and the First and Fifth Amendments. *Id.*

B. The President's Exercise Of The Claims Settlement Power Does Not Violate The Separation Of Powers Doctrine.

As articulated by Dames & Moore, the separation of powers doctrine means that neither Congress nor the President may ''interfere'' with pending judicial cases. D & M Memo. at 21. Ignoring the label ''interfere'', it is undisputed

that both Congress and the Executive branch take many actions which have dispositive effects upon pending cases. This is true because the courts follow the law as it exists at the time they decide a case. For example, a litigant may file a suit alleging a private right of action based upon a federal statute or regulation. If Congress or the Executive branch repeals the statute or rescinds the regulation the plaintiff loses on the "merits" of the claim.

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), demonstrates that international agreements can have the same dispositive effect upon pending litigation. There, Americans received a lower court judgment confirming their claim to a captured French ship. The Supreme Court set aside the judgment on the basis of an intervening international agreement which required renunciation of the Americans' claim to the ship. Dames & Moore's primary response is that a treaty with France was involved there; here there is an executive agreement with Iran. The Supreme Court, however, has ruled that an international agreement made by executive agreement, instead of by treaty, becomes part of the law of the land applied by the courts. *United States v. Pink*, 315 U.S. 203, 230 (1942).

Indeed, Dames & Moore's own memorandum demonstrates that Article II powers can be employed lawfully even where they have a dispositive effect upon pending judicial cases. As Dames & Moore explains, prior to the FSIA the Executive branch could file Suggestions of Immunity in pending cases against foreign entities which led to dismissal of such cases. D & M Memo. at 24.* These Suggestions of Immunity were made solely under the President's Article

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*The FSIA, which was proposed by the Executive branch, ended the practice of Suggestions of Immunity and placed *sovereign immunity* decisions in the judiciary's province. The President, of course, has not purported to grant Iran sovereign immunity.

II powers and were binding upon the courts. *Ex parte Peru*, 318 U.S. 578, 588 (1943). Under Dames & Moore's legal theories, such Suggestions of Immunity must have been unconstitutional because they "interfere[d]" with the judiciary. D & M Memo. at 21. Yet, the Supreme Court found that Suggestions of Immunity were fully constitutional. *Ex parte Peru, supra.*

Here, the President has not purported to divest this Court of jurisdiction. Dames & Moore does not dispute this. It argues that the United States is engaged in a "semantic game" — that if this Court applied the rule of law which arose from the agreements with Iran the *effect* would be the same as a deprivation of this Court's jurisdiction. D & M Memo. at 5. This "effect" argument is a non-sequitur. As discussed above, many different Executive branch actions under the President's Article II powers (*e.g.*, changes in regulations, executive agreements, Suggestions of Immunity) have dispositive effects upon pending litigation. The *effect* of a court lacking jurisdiction over a claim is that the claim fails. Innumerable actions can cause a claim to fail. The suggestion that these actions are equivalent to divesting a court of jurisdiction because the effect is the same is illogical.

The "effect" argument is especially misplaced here because Dames & Moore's claim has not been terminated. At most, it has been suspended. Indeed, if this Court determines, as Dames & Moore intimates (D & M Memo. at 13 n. 4), that Dames & Moore's claim is not arguably arbitrable, its claim is not even suspended.

Dames & Moore's separation of powers argument is itself a semantic smokescreen built with repeated allusions to "usurp[ations]" of judicial power. Here, the President has exercised a vital Article II power which has again proven

essential to resolve an international crisis and aid American claimants. The courts are asked to apply the resulting law of the land.

C. The FSIA Did Not Implicitly Repeal The President's Claims Settlement Powers.

Dames & Moore argues that passage of the FSIA in 1976 divested the President of his Article II claims settlement power. D & M Memo. at 31. The FSIA was proposed by the Executive branch and was intended to withdraw its traditional role in making binding sovereign immunity determinations. The President has not purported to grant Iranian defendants sovereign immunity. The FSIA was *not* a new grant of jurisdiction to federal courts over suits against foreign governments. Such jurisdiction had long existed. See 28 U.S.C. 1332(a)(2) (1976). Moreover, the FSIA merely codified the long-standing "restrictive" view of sovereign immunity which was officially adopted by the United States in 1952 in the "Tate letter." *Unidyne Corp., supra.*, Slip Op. at 5-6.

The argument that the FSIA divested the President of claims settlement power is constructed from whole cloth. Nothing in the language of the FSIA purports to divest the President of his claims settlement power. Nothing in the legislative history purports to do so. Indeed, the legislative history supports the opposite conclusion. See, *e.g., Hearings Before the Subcommittee on Claims and Governmental Relations of the House Judiciary Committee on H.R. 3493: Immunities of Foreign States*, 93 Cong., 1st Sess. 26 (1973). It strains credulity to suggest that the Executive branch *proposed* a bill, without any discussion of its implications, which *sub silentio* deprived the President of his long exercised and vital Article II claims settlement power. As Dames & Moore itself stresses, repeals by implication are

disfavored and must be clear and manifest. D & M Memo. at 48. Moreover, absent the most compelling reasons, a court should not interpret a statute in a manner which places the United States in breach of its international obligations. *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n. 20 (2d Cir. 1980). As Chief Judge Caffrey concluded, "Congress never intended, in passing the Foreign Sovereign Immunities Act, to cripple the negotiating power of American Presidents." *Chas. T. Main Int., supra*, Slip Op. at 8; *Security Pacific National Bank, supra*, Slip Op. at 36.

II. THE PRESIDENT LAWFULLY REVOKED PLAINTIFFS' LICENSES FOR ATTACHMENT AND NULLIFIED THE ATTACHMENTS.

A. IEEPA Authorizes the President's Actions.

The express language of IEEPA authorizes the President's actions. As Chief Judge Caffrey found:

> The Executive Orders are squarely within the authority vested in the President by IEEPA. IEEPA explicitly authorizes the President (1) to "compel . . . and . . . transfer . . . [of] any property in which foreign country or a national thereof has any interest," (2) to "nullify, void, prevent or prohibit, any acquisition [or] holding [of] . . . any property in which any foreign country or a national thereof has any interest," and (3) to "void . . . [the] exercising [of] any right . . . with respect to . . . any property in which any foreign country or a national thereof has any interest . . ." 50 U.S.C. §1701(a)(1)(B).

Chas. T. Main Int., supra, Slip Op. at 8. See also *Unidyne Corp., supra*, Slip Op. at 4-5; *Blount Brothers Corp., supra*.

Dames & Moore secured its pre-judgment attachments under a *revocable* licensee—which the President has re-

voked. 31 C.F.R. 535.805. Dames & Moore's license did not authorize it to secure a judgment. This revocation renders these attachments ineffective. 31 C.F.R. 535.203(e). See *Orvis v. Brownell*, 345 U.S. 187 (1953); *Propper v. Clark*, 337 U.S. 472 (1949); *Security Pacific National Bank, supra*, Slip Op. at 30-32 & n. 19.

The ability to return a foreign nation's property to it pursuant to a claims settlement is also a necessary concomitant to that Article II power.

> Those assets in American hands were a legitimate bargaining chip at the disposal of the President in negotiations with Iran for the release of the hostages. It would be meaningless to recognize the power of the President to negotiate with Frozen Iranian assets if he did not also have the power to transfer then at the conclusion of the negotiations. The release of the attachments is a necessary concomitant of the President's foreign relations under the Constitution and is further authorized by Congress under IEEPA.

Unidyne Corp., supra, Slip Op. at 7-8.

As Justice Jackson noted in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.*, at 653. The conjunction of the President's powers under Article II, IEEPA, and the Hostage Act, 22 U.S.C. 1732, brings the Presidential actions here squarely within this portion of Justice Jackson's test. *Chas. T. Main Int., supra*, Slip Op. at 8-9; *Security Pacific National Bank, supra*, Slip Op. at 12-13, 35-36.

B. The President Has Not Vested Iranian Assets.

Dames & Moore claims that the President has "vested" Iranian property. D & M Memo. at 50-51. Congress denied the President under IEEPA "the power to vest, *i.e.*, to take title to foreign property . . . ." H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 3, 15 (1977). The president has not vested Iranian property. *Security Pacific National Bank, supra*, Slip. Op. at n. 15. Instead, the United States is returning the property to Iran and the Security Fund which will be used to pay judgments of the Tribunal. Indeed, Dames & Moore does not argue that the United States is vesting *Iranian* assets. Rather, Dames & Moore asserts that the United States has vested "our", *i.e.*, Dames & Moore's, assets. D & M Memo. at 51. This is merely a "taking" claim.

III. THE "TAKING" CLAIM IS MERITLESS.

A. The "Taking" Claim Is Premature.

If Dames & Moore ultimately believes that the claims settlement caused it a loss, it may choose to sue the United States. The United States will then defend against any taking claim. In any event, the United States must return Iran's financial assets by July 19, 1981, to avoid breach of its international commitments and the attendant dangers of severe diplomatic and financial repercussions.

B. There Has Been No Taking.

Dames & Moore ask this Court to focus on only a few elements of the Executive branch actions concerning Iranian assets and American claims against those assets. As Judge Bryant observed:

> The fact that there were Iranian assets here to attach is due in large measure to the lawful act of the President freezing those assets by Executive Order No. 12170,

44 Fed. Reg. 65729 (Nov. 15, 1979), after the seizure of the American hostages on November 4, 1979.

Unidyne Corp., supra, Slip Op. at 7. But for the freeze, most American claimants could have ended up with nothing because only three pre-judgment attachments were outstanding before November 14, 1979. The freeze helped enable the President to negotiate a settlement of those claims through an arbitral mechanism. Securing that settlement required a return of most of Iran's property. Therefore, American claimants against Iran, as a result of the sum of Executive branch actions, have gained substantially.

Dames & Moore's taking theory is particularly weak here because, as explained above, it never received more than a revocable license for suit and attachment. That license did not authorize it to secure a judgment.

President Carter reached the claims settlement with Iran not simply to free the hostages, but because he believed it was in the best interest of American claimants. As the Declaration of Secretary Haig, attached to the February 26, 1981 Statement of Interest explained, President Reagan agreed. The Tribunal has great advantages for American claimants. It will begin with a $1 billion Security Account. Dames & Moore asserts that this Security Account is insufficient because it asserts that American claims against Iran total $3-4 billion. D & M Memo. at 12. Dames & Moore cites no source for this estimate and its complaint contains no such allegation. Even if the $3-4 billion figure were true, it would merely represent plaintiffs' lawyers' maximum claims. The actual awards, regardless of whether the United States judiciary or Tribunal makes them, will be far less. Moreover, Iran must maintain at least $500 million in the Security Account until all awards of the Tribunal are satisfied in full. If Iran defaulted on this requirement, it would pay dearly. The Tribunal's awards are enforceable

in the courts of any country and the Tribunal could assess additional damages against Iran which would be similarly enforceable.

Iran will also be unable to raise important defenses, *e.g.*, sovereign immunity, act of state, and personal jurisdiction, which it would have had in United States courts. Without the Tribunal, many claimants could secure no recovery in United States courts. See, *e.g.*, *Security Pacific National Bank, supra,* Slip Op. at 32-33.

Plaintiffs who signed binding contracts with Iranian entities specifying Iranian courts as the sole forum for dispute resolution also have no taking claim. Any loss they may suffer is because of the contracts they negotiated. Moreover, if the Tribunal does not hear a claim because of an Iranian forum clause, the suspension of the claim before the United States courts terminates and the American claimant may still achieve full recovery.

The case law does not support Dames & Moore's taking claims. Dames & Moore relies primarily upon *Seery v. United States,* 127 F. Supp. 601 (Ct. Cl. 1955), and *Gray v. United States,* 21 Ct. Cl. 340 (1886) (advisory opinion). *Seery v. United States* does not address the issues in these cases. There, the United States claimed that an agreement with Austria barred a United States citizen from pursuing a claim against the *United States*. 127 F. Supp. at 603, 606. Here, only claims against Iran have been settled. See, *Security Pacific National Bank, supra,* Slip Op. at 38 n. 26.

Gray v. United States, 21 Ct. Cl. 340 (1886), does not support Dames & Moore. *Gray* was "strictly an advisory opinion which was not binding upon either of the parties and cannot be binding upon subsequent courts." *Aris Gloves, Inc. v. United States,* 420 F.2d 1386, 1393 (Ct. Cl.

1970). As the Supreme Court said of *Gray* "[w]e think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace not of right." *Blagge v. Balch*, 162 U.S. 439, 457 (1896). See *Security Pacific National Bank, supra*, Slip Op. at 37-39.

Dames & Moore also relies upon *National Airmotive Corp. v. Government & State of Iran, supra* and *Behring International, Inc. v. Miller*, No. 80-2864 (D.N.J. Dec. 24, 1980). Neither of these cases is entitled to any weight on the taking claim. The statements in these opinions relied on here are dicta on a matter which was not even at issue in those cases.

IV. THE CONSTITUTIONAL CLAIMS LACK MERIT.

Dames & Moore claims a right of access to the courts; it argues that a civil claimant has a right under the First and Fifth Amendments to have its claim against a foreign entity heard by a United States court. No case has ever so held. These are cases involving the rights of criminal defendants and prisoners to a judicial forum, but these cases are inapplicable to civil claimants unless a fundamental human relationship (*e.g.*, divorce) is at stake in the civil process. *Ortwein v. Schwab*, 410 U.S. 656 (1973); *United States v. Kras*, 409 U.S. 434 (1973); *Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971). Here, Dames & Moore's claims are simply commercial claims against Iran. The availability of an alternative forum also prevents a finding of an unconstitutional denial of access. *Woods v. Holy Cross Hospital*, 591 F.2d 1164, 1173, n. 16 (5th Cir. 1979). The dictum in *National Airmotive Corp, supra* is again the authority relied upon by Dames & Moore. D & M Memo. at 42.

Nor has Dames & Moore suffered a denial of equal protection. In essence, it complains that the United States was able to negotiate a more favorable claims settlement for banks than for other claimants.

The premise of its argument is that the United States deliberately discriminated against non-bank plaintiffs. D & M Memo. at 35 n. 12. Again, this claim is not raised in the complaint and no supporting facts have been plead. The notion that the United States, not Iran, was purposely seeking to bar the claims of American entities like the plaintiff's is absurd.

CONCLUSION.

The President has lawfully exercised his constitutional and statutory claims settlement powers. This Court should dismiss Dames & Moore's complaint for failure to state a claim upon which relief may be granted.

Respectfully submitted,

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ORDER.

United States District Court, Central District of California.

Daniel, Mann, Johnson & Mendenhall, a California corporation, Plaintiff, v. Donald T. Regan, et al., Defendants. CV 81-1101 LEW.

Dames & Moore, a partnership, Plaintiff, v. Donald T. Regan, et al., Defendants. CV 81-2064 LEW.

Dames & Moore, a partnership, Plaintiff, v. Atomic Energy Organization of Iran, et al., Defendants. CV 79-4918.

Daniel, Mann, Johnson & Mendenhall, a California corporation, Plaintiff, v. Imperial Government of Iran, et al., Defendants. CV 80-277 LEW.

Filed: May 28, 1981.

In CV 81-1101 LEW and CV 81-2064 LEW, plaintiffs, Dames & Moore and Daniel, Mann, Johnson & Mendenhall, have filed motions for preliminary injunction. Defendants in CV 81-1101 LEW and CV 81-2064 LEW have filed motions to dismiss. The United States of America has also been allowed to intervene as a party defendant in CV 789-4918 LEW. The United States has filed a motion to stay the judgment entered on February 18, 1981, in CV 79-4918 LEW.

All parties in CV 79-4918 LEW and CV 80-277 LEW have been given the opportunity to brief the issues raised by the motions in CV 81-1101 LEW and CV 81-2064 LEW. Because the Court's resolution of the issues raised in CV 81-1101 LEW and CV 81-2064 LEW will be dispositive of the question of whether the attachments in CV 79-4918 LEW and CV 80-277 LEW are without legal basis, the Court has chosen to issue this consolidated order. After consideration of all of the papers submitted in connection

with these matters, and oral argument thereon, and good cause appearing therefor,

IT IS ORDERED that

Plaintiffs' motions for preliminary injunction in CV 81-1101 LEW and CV 81-2064 LEW are denied.

Defendants' motions to dismiss in CV 81-1101 LEW and CV 81 2004 LEW are granted. The complaints of Daniel, Mann, Johnson & Mendenhall and Dames & Moore in CV 81-1101 LEW and CV 81-2064 LEW are hereby dismissed for failure to state a claim upon which relief may be granted.

The United States's motion to stay the judgment entered on February 18, 1981, in CV 79-4918 LEW is granted.

All proceedings in CV 79-4918 LEW and CV 80-277 LEW are hereby stayed. The attachments in CV 79-4918 LEW and CV 80-277 LEW are vacated as without further legal basis. The vacating of the attachments is stayed until July 19, 1981. To the extent that the decision of the Court to vacate the attachments is not a final and appealable order, the issue of the validity of the Executive Orders that suspend all claims against Iran and nullify attachments against Iranian assets is certified for interlocutory appeal pursuant to 28 U.S.C. §1292(b) on the grounds that it is a controlling question of law as to which there is substantial ground for difference of opinion and that the immediate appeal of this order will materially advance the termination of this litigation.

DATED: May 28, 1981

/s/ Laughlin E. Waters
Laughlin E. Waters
United States District Judge

CONSTITUTION OF THE UNITED STATES.

* * *

Article I

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

To constitute Tribunals inferior to the supreme Court;

* * *

Article II.

* * *

Section. 2. The President . . .

. . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors. . . .

* * *

Article III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts

as the Congress may from time to time ordain and establish.

. . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

Article VI

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peacably to assemble, and to petition the government for a redress of grievances.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Foreign Sovereign Immunities Act of 1976 28 U.S.C. §§ 1602 *et seq.*

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activites are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter —

(a) A ''foreign state'', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An ''agency or instrumentality of a foreign state'' means any entity —

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

(c) The ''United States'' includes all territory and waters, continental or insular, subject to the jurisdiction of the Untied States.

(d) A ''commercial activity'' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A ''commercial activity carried on in the United States by a foreign state'' means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial ac-

tivity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activitiy carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to —

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which

maritime lien is based upon a commercial activity of the foreign state: *Provided*, That —

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit — unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same

manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim —

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services — and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a ''notice of suit'' shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state —

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made —

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof,

or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property —

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consist of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if —

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of

section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if —

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state

as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if —

(1) the property is that a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.*

§ 1701. Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities

(a) Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

§ 1702. Presidential authorities

(a)(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise —

(A) investigate, regulate, or prohibit —

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.

(2) In exercising the authorities granted by paragraph (1), the President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in paragraph (1) either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of such paragraph. In any case in which a report by a person could be required under this paragraph, the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

(3) Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued under this chapter.

(b) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly —

(1) any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value; or

(2) donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations (A) would seriously impair his ability to deal with any national emergency declared under section 1701 of this title, (B) are in response to coercion against the proposed recipient or donor, or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances.

§ 1703. Consultation and reports — Consultation with Congress

(a) The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter and shall consult regularly with the Congress so long as such authorities are exercised.

Report to Congress upon exercise of Presidential authorities

(b) Whenever the President exercises any of the authorities granted by this chapter, he shall immediately transmit to the Congress a report specifying—

(1) the circumstances which necessitate such exercise of authority;

(2) why the President believes those circumstances constitute an unusual and extraordinary threat, which

has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;

(3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;

(4) why the President believes such actions are necessary to deal with those circumstances; and

(5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

Periodic follow-up reports

(c) At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) of this section with respect to an exercise of authorities under this chapter, the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b) of this section.

Supplemental requirements

(d) The requirements of this section are supplemental to those contained in Title IV of the National Emergencies Act.

§ 1704. Authority to issue regulations

The President may issue regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by this chapter.

§ 1705. Penalties

(a) A civil penalty of not to exceed $10,000 may be imposed on any person who violates any license, order, or regulation issued under this chapter.

(b) Whoever willfully violates any license, order, or regulation issued under this chapter shall, upon conviction, be fined not more than $50,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

§ 1706. Savings provisions — Termination of national emergencies pursuant to National Emergencies Act

(a)(1) Except as provided in subsection (b) of this section, notwithstanding the termination pursuant to the National Emergencies Act of a national emergency declared for purposes of this chapter, any authorities granted by this chapter, which are exercised on the date of such termination on the basis of such national emergency to prohibit transactions involving property in which a foreign country or national thereof has any interest, may continue to be so exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

(1) Notwithstanding the termination of the authorities described in section 1010(b) of this Act, any such authorities, which are exercised with respect to a country on the date of such termination to prohibit transactions involving any property in which such country or any national thereof has any interest, may continue to be exercised to prohibit transactions involving that property if the President deter-

mines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

Congressional termination of national emergencies by concurrent resolution

(b) The authorities described in subsection (a)(1) of this section may not continue to be exercised under this section if the national emergency is terminated by the Congress by concurrent resolution pursuant to section 202 of the National Emergencies Act and if the congress specifies in such concurrent resolution that such authorities may not continue to be exercised under this section.

Supplemental savings provisions; supersedure of inconsistent provisions

(c)(1) The provisions of this section are supplemental to the savings provisions of paragraphs (1), (2), and (3) of section 101(a) and of paragraphs (A), (B), and (C) of section 202(a) of the National Emergencies Act.

(2) The provisions of this section supersede the termination provisions of section 101(a) and of title II of the National Emergencies Act to the extent that the provisions of this section are inconsistent with these provisions.

Periodic reports to Congress

(d) If the President uses the authority of this section to continue prohibitions on transactions involving foreign property interests, he shall report to the Congress every six months on the use of such authority.

3 U.S.C. §301.

§ 301 General authorization to delegate functions: publication of delegations

The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President: *Provided*, That nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions. Such designation and authorization shall be in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part.

22 U.S.C. §1732.

§ 1732. Release of citizens imprisoned by foreign governments

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

28 U.S.C. § 1254.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

28 U.S.C. § 1330.

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1331.

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States.

28 U.S.C. 1332.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided, further* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of

any State by which the insurer has been incorporated and the State where it has its principal place of business.

(d) The word ''States'', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. 1391.

§ 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(b) A civil action where jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

(e) A civil action which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to

the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought —

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

28 U.S.C. § 1651.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. §§ 2201-2202.

Chapter 151. — DECLARATORY JUDGMENTS

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

50 U.S.C. § 1631.

§ 1631. Declaration of national emergency by Executive order; authority; publication in Federal Register, transmittal to Congress

When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act. such specification may be made either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress.

Federal Rules of Civil Procedure Rule 54.

Rule 54. Judgments; Costs

(a) Definition; Form. ''Judgment'' as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against

the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Federal Rules of Civil Procedure, Rule 56.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually

and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the actions as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or

solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Federal Rules of Civil Procedure Rule 64.

Rule 64. Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Federal Rule of Civil Procedure Rule 69.

Rule 69. Execution.

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may obtain discovery from person, including the judgment

debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

(b) Against Certain Public Officers. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28; USC, § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, c 130 § 8. (18 Stat 401), USC, Title 2, § 118, and when the court has given the certificate or probably cause for his act as provided in those statutes, execution shall not issue against the officer or his property but the final judgment shall be satisfied as provided in such statutes.

31 CFR Part 535 is amended as follows:

1. With an identical paragraph (c), §§ 535.213 and 535.214 are revised to read as follows:

§ 535.213 Direction involving property held by offices of banks in the United States in which Iran or an Iranian entity has an interest.

(a) Any branch or office of a bank, which branch or office is located within the United States and is, on the effective date of this section, either (1) in possession of funds or securities legally or beneficially owned by the Government of Iran or its agencies, instrumentalities or controlled entities, or (2) carrying on its books deposits standing to the credit of or beneficially owned by such government or its agencies, instrumentalities or controlled entities, is licensed, authorized, directed and compelled to transfer such funds, securities and deposits, held on January 19, 1981, including interest from November 14, 1979, at commercially reasonable rates, to the Federal Reserve Bank of New York, as fiscal agent of the U.S., to be held or transferred as directed by the Secretary of the Treasury.

(b) Transfers of funds, securities or deposits under paragraph (a) of this section shall be in accordance with the provisions of § 535.221 of this part.

(c) Any funds, securities or deposits subject to a valid attachment, injunction or other like proceeding or process not affected by § 535,218 need not be transferred as otherwise required by this section.

§ 535.214 Direction involving other financial assets in which Iran or an Iranian entity has an interest held by any person subject to the jurisdiction of the United States.

(a) Any person subject to the jurisdiction of the United States which is not a banking institution and is on January 19, 1981, in possession or control of funds or securities of

Iran or its agencies, instrumentalities or controlled entities is licensed, authorized, directed and compelled to transfer such funds or securities to the Federal Reserve Bank of New York, as fiscal agent of the U.S. to be held or transferred as directed by the Secretary of the Treasury. However, such funds and securities need not be transferred until any disputes (not relating to any attachment, injunction or similar order) as to the entitlement of Iran and its entities to them are resolved.

(b) Transfers of funds, securities or deposits under paragraph (a) of this section shall be in accordance with the provisions of § 535.221 of this part.

(c) Any funds, securities or deposits subject to a valid attachment, injunction or other like proceeding or process not affected by § 535.218 need not be transferred as otherwise required by this section.

2. Section 535.215 is amended by designating the existing paragraph as (a) and by adding paragraph (b) to read as follows:

§ 535.215 Direction involving other properties in which Iran or an Iranian entity has an interest held by any person subject to the jurisdiction of the United States.

* * * * *

(b) Any properties subject to a valid attachment, injunction or other like proceeding or process not affected by § 535.218 need not be transferred as otherwise required by this section.

3. Section 535.218 is amended by the revision of the section title and of paragraph (e) and the addition of new paragraphs (f) and (g) to read as follows:

§ 535.218 Prohibitions and nullifications with respect to property described in §§ 535.211, 535.212, 535.213, 535.214 and 535.215 and standby letters of credit.

* * * * *

(e) Paragraph (a) of this section does not revoke or withdraw specific licenses authorizing the operation of blocked accounts which were issued prior to January 19, 1981, and which do not relate to litigation. Such licenses shall be deemed to be revoked as of May 31, 1981, unless extended by general or specific license issued subsequent to February 26, 1981.

(f) The provisions of paragraphs (a), (b) and (c) of this section shall apply to contested and contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities or controlled entities, including debts.

(g) All existing attachments on standby letters of credit, performance bonds and similar obligations and on substitute blocked accounts established under § 535.568 relating to standby letters of credit, performance bonds and similar obligations are nullified and all future attachments on them are hereafter prohibited. All rights, powers and privileges relating to such attachments are nullified and all persons hereafter are barred from asserting or exercising any rights, powers or privileges derived therefrom.

4. Section 535.504 is amended by relettering existing paragraph (c) as (d); and by adding new paragraphs (c) and (e) to read as follows:

§ 535.504 Certain judicial proceedings with respect to property of Iran or Iranian entities.

* * * * *

(c) For purposes of this section, contested and contingent liabilities and property interests of the Government of

Iran, its agencies, instrumentalities, or controlled entities, including debts, shall be deemed to be subject to § 535.215.

* * * * *

(e) Judicial proceedings to obtain attachments on standby letters of credit, performance bonds or similar obligations and on substitute blocked accounts established under § 535.568 relating to standby letters of credit, performance bonds and similar obligations are not authorized or licensed.

5. Amendment No. 25 of the amendments to the Regulations published at 46 FR 14337 on February 26, 1981, is corrected by deleting § 535.332 in the list of revoked sections. There has never been a § 535.332.

Dated: May 8, 1981.

Dennis M. O'Connell,

Director:

Approved:

John P. Simpson,

Acting Assistant Secretary, Enforcement and Operations.

[FR Doc. 81-14509 Filed 5-11-81; 3:40 pm]
BILLING CODE 4810-25-M

For Immediate Release

Treasury Amends Regulations to Require Transfer of Iranian Bank Deposits

Thursday, June 4, 1981

The Department of the Treasury announced today that it has delivered to the *Federal Register* for publication amendments to the Iranian Assets Control Regulations requiring the transfer of bank deposits and certain other financial assets of Iran in the United States to the Federal Reserve Bank of New York by noon, June 19. The amendments will facilitate implementation of the Iran-U.S. agreements of January 19, 1981, which call for the transfer of the deposits abroad by July 19. According to the agreements, half of the deposits (up to $1 billion) are to be set aside in a Security Account to pay awards against Iran by the Iran-U.S. Claims Tribunal to U.S. claimants. The balance will go to Iran.

Treasury estimates the principal amount of the bank deposits to be about $2.08 billion. Although the exact amount of interest will not be known until the transfers are made, Treasury believes that the amount of interest should exceed $250 million.

The Treasury announcement follows major decisions in the Federal Courts of Appeal in two circuits upholding the President's power to nullify attachments on the Iranian assets and to order their transfer. In Regulations issued February 26, 1981, Treasury stated that it would not seek to enforce the transfer requirement (through the application of civil and criminal sanctions) until there had been a definitive legal ruling upholding the President's authority. Today's action removes this protection from enforcement action from the Regulations. Holders of assets to be transferred are obligated under the new amendments to take all action they believe necessary to effect the required transfers.

The June 19 date is a firm one under the present circumstances. However, it should also be emphasized that if the Supreme Court accepts for review and sets for argument on an expedited basis an appropriate case which properly presents the legal issues surrounding the transfer of these assets, the holders of these assets can be assured that the enforcement policy would be adjusted accordingly. We believe that the case for which Supreme Court review has already been sought, *Electronic Data Systems Corp. v. Social Security Organization of the Government of Iran*, is not such an appropriate case.

Both the present Attorney General and his predecessor had given opinions that the President's Executive Orders, upon which the Treasury transfer requirements are based, are lawful.

Department of the Treasury

Office of Foreign Assets Control
31 CFR Part 535

Iranian Assets Control Regulations:
Transfer of Financial Assets
to Federal Reserve Bank of New York

AGENCY: Office of Foreign Assets Control.
ACTION: Final Rule.

SUMMARY: The Office of foreign Assets control is amending the Iranian Assets Control Regulations. The purposes of the amendments are: (1) to direct banks and other persons holding Iranian financial assets to transfer them to the Federal Reserve Bank of New York on or before noon, E.D.T., June 19, 1981; (2) to revoke the policy of not seeking to impose criminal and civil sanctions on holders of Iranian property who do not comply with the transfer requirements of the Iranian Assets Control Regulations; (3) to provide additional guidance on the meaning of the term "commercially reasonable" rates of interest; (4) to make clear that no transfer requirement under section 535.213 or 535.214 shall be deemed to authorize or compel any payment or transfer of any obligation under a standby letter of credit, performance bond, or similar obligation as to which a blocked account has been established pursuant to section 535.568 or as to which payment is prohibited under an injunction obtained by the account party; and (5) to require that persons making the required transfers of financial assets of Iran to the Federal Reserve Bank of New York promptly report on those transfers to the Office of Foreign Assets Control.

The amendments are needed to facilitate the ongoing implementation of the Iran-U.S. agreements of January 19, 1981, providing for the release of the hostages detained in

Iran and the transfer of Iranian property blocked by the United States.

In a recent decision, *Chas. T. Main International, Inc. v. Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir., May 22, 1981), the United States Court of Appeals for the First circuit held that the President has authority to order the transfer of blocked Iranian assets without regard to attachments or other judicial orders obtained subsequent to the November 14, 1979, blocking order, and that he has the authority to settle claims of U.S. parties against Iranian entities by providing for their submission to binding arbitration.

Similarly, the United States Court of Appeals for the District of Columbia Circuit, in *American International Group v. Islamic Republic of Iran*, No. 80-1779 (D.C. Cir., May 22, 1981), reviewed the Executive Orders nullifying attachments and suspending claims in implementation of the January 19, 1981, agreements, and rendered a judgment that the suspension of claims "is a lawful exercise of the President's power to arrange for the settlement of claims of American nationals against the governments of foreign states," and directed that attachments and other provisional remedies be vacated. These decisions confirm the legal judgments reached by the present Attorney General of the United States, and his predecessor, upholding the President's authority to order the prompt transfer of property in which Iran has an interest. Further, they provide the basis for revocation of the policy established by the prior regulations against the seeking of civil and criminal sanctions against persons who hold or control Iranian property required to be transferred.

Section 203(a)(3) of the International Emergency Economic Powers Act (50 USC 1702(a)(3)), Section 1-103 of Executive Order 12279, Section 1-103 of Executive Order

12280, Section 1-103 of Executive Order 12281 and Section 535.219 of the Iranian Assets Control Regulations provide that compliance with the transfer directives of the Iranian Assets Control Regulations shall, to the extent thereof, be a full acquittance and discharge for all purposes of the obligations of the person so complying and further provide that no person shall be liable in any United States court for anything done or omitted in good faith compliance therewith.

EFFECTIVE DATE: June 4, 1981.

FOR FURTHER INFORMATION CONTACT: Raymond W. Konan, Chief Counsel, Office of Foreign Assets Control, Department of the Treasury, Washington, D.C. 20220, Tel. (202) 376-0236.

SUPPLEMENTARY INFORMATION: Since the Regulations involve a foreign affairs function, the provisions of the Administrative Procedure Act, 5 U.S.C. 553, requiring notice of proposed rulemaking, opportunity for public participation and delay in effective date are inapplicable.

31 CFR Part 535 is amended as follows:

1. Section 535.213 is amended by the revocation and removal of paragraph (b), by adding a new paragraph (b) in its place, and by adding paragraph (d) as follows:

* * *

(b) Transfers of funds, securities or deposits under paragraph (a) of this section shall be in accordance with the provisions of section 535.221 of this part, and such funds, securities or deposits, plus interest at commercially reasonable rates from November 14, 1979, to the transfer date, shall be received by the Federal Reserve Bank of New York on or before noon, E.D.T., June 19, 1981. For periods for which rates are to be determined in the future, whether by agreement between Iran and the bank or otherwise (see

section 535.440), interest for such periods shall be transferred to the Federal Reserve Bank of New York promptly upon such determination. Persons in possession or control of property required to be transferred by this section shall take all actions they believe necessary to effect the required transfers.

* * *

(d) The transfers of securities required by this section shall be made notwithstanding section 535.202.

2. Section 535.214 is amended by the revocation and removal of paragraph (b), by adding a new paragraph (b) in its place, and by adding paragraph (d) as follows:

* * *

(b) Transfers of funds and securities under paragraph (a) of this section shall be in accordance with the provisions of section 535.221 of this part, and such funds and securities shall be received by the Federal Reserve Bank of New York on or before noon, E.D.T., June 19, 1981. Persons in possession or control of property required to be transferred by this section shall take all actions they believe necessary to effect the required transfers.

* * *

(d) The transfers of securities required by this section shall be made notwithstanding section 535.202.

3. Section 535.221 is amended by the revocation and removal of paragraphs (a), (b) and (f), by the revision and paragraphs (c) and (d) and by the relettering of paragraphs. As amended, section 535.221 reads as follows:

Section 535.221 *Compliance with directive provisions.*

(a) Transfers of deposits or funds required by sections 535.213 and 535.214 of this part shall be effected by means of wire transfer to the Federal Reserve Bank of New York

for credit to the following accounts: with respect to transfers required by section 535.213, to the Federal Reserve Bank of New York, as fiscal agent of the United States, Special Deposit Account A, and with respect to transfers required by section 535.214, to the Federal Reserve Bank of New York, as fiscal agent of the United States, Special Deposit Account B.

(b) Securities to be transferred as required by sections 535.213 and 535.214 of this part that are not presently registered in the name of Iran or an Iranian entity shall be delivered to the Federal Reserve Bank of New York in fully transferable form (bearer or endorsed in blank), accompanied by all necessary transfer documentation, *e.g.*, stock or bond powers or powers of attorney. All securities transferred, including those presently registered in the name of Iran or an Iranian entity, shall be accompanied by instructions to deposit such securities to the following accounts: with respect to transfers required by section 535.213, to the Federal Reserve Bank of New York, as fiscal agent of the United States, Special Custody Account A, and with respect to transfers required by section 535.214, to the Federal Reserve Bank of New York, as fiscal agent of the United States, Special Custody Account B.

(1) Securities which are in book-entry form shall be transferred by wire transfer to the Federal Reserve Bank of New York to the appropriate account named in this paragraph.

(2) Definitive securities which are in bearer or registered form shall be hand delivered or forwarded by registered mail, insured, to the Federal Reserve Bank of New York, Safekeeping Department, to the appropriate account named in this paragraph.

(c) If a security in which Iran or an Iranian entity has an interest is evidenced by a depositary receipt or other evi-

dence of a security, the legal owner of such security shall arrange to have the security placed in fully transferable form (bearer or endorced in blank) as provided in paragraph (b) of this section, and transferred pursuant to paragraph (b)(2) of this section.

(d) Any person delivering a security or securities to the Federal Reserve Bank of New York under paragraph (b) shall provide the Bank at least two business days prior written notice of such delivery, specifically identifying the sending person, the face or par amount and type of security, and whether the security is in bearer, registered or book-entry form.

4. Section 535.337 is amended to read as follows:

Section 535.337 *Funds.*

For purposes of this part, the term ''funds'' shall mean monies in trust, escrow accounts and similar special funds, money market funds, cash balances held by a broker/dealer, currency and coins. It does not include accounts created under section 535.568.

5. Section 535.438 is amended by redesignating the existing text as paragraph (a) and by adding a new paragraph (b) as follows:

* * *

(b) No transfer requirement under section 535.213 or 535.214 shall be deemed to authorize or compel any payment or transfer of any obligation under a standby letter of credit, performance bond or similar obligation as to which a blocked account has been established pursuant to section 535.568 or as to which payment is prohibited under an injunction obtained by the account party.

6. Section 535.440 is amended to read as follows:

Section 535.440 *Commercially reasonable interest rates.*

For purposes of section 535.212 and 535.213, what is meant by ''commercially reasonable rates'' depends on the particular circumstances. In the case of time or savings deposits, the ''commercially reasonable rate'' is that rate provided for by the deposit agreement or applicable law. With respect to other obligations where the rate remains to be determined, it is presently expected that the ''commercially reasonable rate'' will be the rate agreed upon by the bank and Iran. However, where a deposit has in fact operated as a demand account under Treasury license, it would be appropriate to treat the deposit for purposes of sections 535.212 and 535.213 as a non-interest-bearing account.

7. New section 535.620 is added as follows:

Section 535.620 *Report of Transfer of domestic bank assets and financial assets held by nonbanking institutions.*

(a) *Requirement for reports.* A report shall be filed on Form TFR-620 by any bank or nonbanking institution regarding any transfer to the Federal Reserve Bank of New York under sections 535.213 and 535.214 within 5 business days of such transfer.

(b) *Contents of report.* Each report shall contain the following information:

(1) Name and address of the transferor (indicate whether bank or nonbanking institution).

(2) Name and telephone number of person to be contacted about the transfer.

(3) Description of the property transferred with a list of accounts transferred, including account party, account number, and account amount, with breakdown between principal and interest.

(4) Total value (market value in the case of securities) of each transfer.

(5) Date and time of transfer.

(6) A statement as to how interest was calculated, including rate(s) of interest and period(s) for which the rate(s) was applied.

(c) *Filing.* Reports shall be prepared in triplicate. Two copies shall be sent in a set to Unit 620, Office of Foreign Assets Control, Department of the Treasury, Washington, D.C. 20220. The third copy shall be retained for the reporter's records.

(d) *Confidentiality of reports.* Reports under this section are regarded as privileged and confidential but may be disclosed to Iran.

(Sec. 201-207, 91 Stat. 1626, 50 U.S.C. 1701-1706; E.O. No. 12170, 44 FR 65729; E.O. No. 12205, 45 FR 24099; E.O. No. 12211, 45 FR 26605; E.O. No. 12276, 46 FR 7913· E.O. No. 12279, 46 FR 7919; E.O. No. 12280, 46 FR 7921; E.O. No. 12281, 46 FR 7923; E.O. No. 12282, 46 FR 7925; and E.O. No. 12294, 46 FR 14111.)

Dated: June 4, 1981

Dennis M. O'Connell
Director

Approved: John P. Simpson
Acting Assistant Secretary,
Enforcement and Operations

Memorandum.

United States District Court, Central District of California.

Dames & Moore, a partnership, Plaintiff, v. Donald T. Regan, the Secretary of the Treasury of the United States of America, and the United States of America, Defendants. No. CV 81-2064-LEW (Px).

Daniel, Mann, Johnson & Mendenhall, a California corporation, Plaintiff, v. Donald T. Regan, the Secretary of the Treasury of the United States of America, and the United States of America, Defendants. No. CV 81-1101-LEW (Px).

Filed: June 8, 1981.

The Court's Order filed May 28, 1981, entered June 2, 1981, to the extent that it related to CV 81-2064-LEW (Px), was made on the basis of the arguments presented by the Government in the Motion to Dismiss Dames & Moore's Complaint for Failure to State a Claim upon which Relief may be Granted and in the Government's Memorandum in Support of Defendant's Motion to Dismiss and in Opposition to Dames & Moore's Brief as Amicus Curiae.

Dated: June 8, 1981.

/s/ Laughlin E. Waters,
Laughlin E. Waters
United States District Judge

Docket Fee Payment Notification Form.

United States Court of Appeals for the Ninth Circuit.

I.

Short Case Title: *Dames & Moore vs. Donald T. Regan, et al.* U.S. Court of Appeals Docket Number (if assigned) 81-5450, June, 4 1981. U.S. District Court Central. U.S. District Court Docket Number CV 81-2064 (LEW).

II.

Date Notice of Appeal Received/Lodged/Filed (please circle one) 6/3/81.

III.

A. Date U.S. Court of Appeals Docket Fee Paid 6/3/81, Amount $70.00.

IV.

Form Completed in the U.S. District Court by:

/s/ A.M.
A. Miyagishma
Deputy Clerk.

Notice of Appeal.

United States District Court, Central District of California.

Dames & Moore, Plaintiff, v. Donald T. Regan, the Secretary of the Treasury of the United States of America, and the United States of America, Defendants. Case No. CV 81-2064 LEW (Px).

To Donald T. Regan and the United States of America and Their Attorneys of Record Herein:

Please Take Notice that Plaintiff Dames & Moore (''Plaintiff'') hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered on June 2, 1981, which denied Plaintiff's motion for a preliminary injunction and dismissed Plaintiff's complaint for failure to state a claim upon which relief may be granted.

Pursuant to Rule 33 of the Local Rules of the Central District of California, the names of all the parties to the judgment and the names and addresses of their respective attorneys are:

Party: Dames & Moore. *Attorneys*: Tuttle & Taylor Incorporated, 609 South Grand Avenue, Los Angeles, California 90017.

Party: Donald T. Regan and the United States of America. *Attorneys*: Dzintra I. Janavs, Esq., Assistant United States Attorney,1100 United States Courthouse, 312 North Spring

Street, Los Angeles, California 90012. William Black, Esq., Department of Justice-Civil Division, Room 3338, 9th & Pacific Avenue, N.W., Washington, D.C. 20530.

Dated: June 3, 1981.

TUTTLE & TAYLOR Incorporated
MERLIN W. CALL
C. STEPHEN HOWARD
WILLIAM C. SCHWEINFURTH
JEFFREY M. HAMERLING

/s/ Jeffrey M. Hamerling
Jeffrey M. Hammerling, a member of the law firm of TUTTLE & TAYLOR Incorporated, Attorneys for Plaintiff Dames & Moore

Declaration of Service.

State of California, County of Los Angeles.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 609 South Grand Avenue, Los Angeles, California 90017.

On June 3, 1981, I served the foregoing document described as NOTICE OF APPEAL on the parties in this action by sending a true copy by *Express Mail* thereof enclosed in a sealed envelope with postage thereon fully prepaid addressed as follows:

William Black, Esq.
Department of Justice-Civil Division
Room 3338
9th & Pacific Avenue, N.W.
Washington, D.C. 20530

and by causing a true copy thereof to be delivered to the offices of:

Dzintra I. Janavs, Esq.
Assistant United States Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Michael D. Koomer, Esq.
Pacht, Ross, Warne, Bernhard & Sears,
Inc.
Suite 500
1800 Avenue of the Stars
Los Angeles, California 90067

Gerald M. Singer, Esq.
10100 Santa Monica Boulevard
26th Floor
Los Angeles, California 90067

Executed on June 3, 1981, at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Delilah A. Phiefer
Delilah A. Phiefer

Order.

United States District Court, Central District of California.

Dames & Moore, a partnership, Plaintiff, v. Donald T. Regan, the Secretary of the Treasury of the United States of America, and the United States of America, Defendants. No. CV 81-2064-LEW (Px).

Daniel, Mann, Johnson & Mendenhall, a California corporation, Plaintiff, v. Donald T. Regan, the Secretary of the Treasury of the United States of America, and the United States of America, Defendants. No CV 81-1101-LEW (Px).

Filed: June 8, 1981.

During the pendency of the appeal in CV 81-2064-LEW (Px) defendants are restrained from transferring, or requiring any other person to transfer, from their present locations, any property or assets of the Government of Iran, or any of its agencies, instrumentalities, controlled entities or per-

sons, or affiliates, which is subject to any writ of attachment, garnishment, judgment, levy, or other judicial lien, issued by this Court or any other Court, in favor of Dames & Moore.

Dated: June 8, 1981.

/s/ Laughlin E. Waters
Laughlin E. Waters
United States District Judge

Presented by:

TUTTLE & TAYLOR Incorporated
MERLIN W. CALL
C. STEPHEN HOWARD
WILLIAM C. SCHWEINFURTH
JEFFREY M. HAMERLING
/s/ C. Stephen Howard
C. Stephen Howard, a member of
the law firm of Tuttle & Taylor
Incorporated, Attorneys for
Plaintiff Dames & Moore

No. 80-2078
IN THE

Supreme Court of the United States

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

JOINT APPENDIX.

C. STEPHEN HOWARD,
Counsel of Record,
MERLIN W. CALL,
RAYMOND C. FISHER,
MILES N. RUTHBERG,
WILLIAM C. SCHWEINFURTH,
JEFFREY M. HAMERLING,
TUTTLE & TAYLOR Incorporated,
609 South Grand Avenue,
Los Angeles, Calif. 90017
(213) 683-0600,
Attorneys for Petitioner, Dames & Moore,

Of Counsel:
STANLEY C. FICKLE,
Indiana University School of Law,
Bloomington, Indiana 47401,
(812) 337-7272.

PETITION FOR CERTIORARI BEFORE JUDGMENT FILED JUNE 10, 1981.

PETITION FOR CERTIORARI BEFORE JUDGMENT GRANTED JUNE 11, 1981.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

APPENDIX

I.

Docket Entries in the United States District Court for the Central District of California in *Dames & Moore v. Donald T. Regan*, No. CV 81-2064 LEW (Px)* ..... App. p. 1

II.

Notice of Motion and Motion for Preliminary Injunction, filed April 28, 1981, in *Dames & Moore v. Donald T. Regan*, No. CV 81-2064 LEW (Px) 4

*As of this date, there are no docket entries in the United States Court of Appeals for the Ninth Circuit in *Dames & Moore v. Donald T. Regan*, No. 81-5450.

No. 80-2078

IN THE

Supreme Court of the United States

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents.

Docket Entries in the United States District Court for the Central District of California in *Dames & Moore v. Donald T. Regan*, No. CV 81-2064 LEW (Px).

Dames & Moore, a partnership, Plaintiffs vs. Donald T. Regan, The Secretary of the Treasury of the United States of America, and The United States of America, Defendants.

Cause: Complt for Injunctive and Declaratory Relief.

Attorneys: Tuttle & Taylor, Jeffrey M. Hamerling, 609 So. Grand Avenue, Los Angeles, Calif. 90017, (213) 683-0600.

DATE	NR.	PROCEEDINGS
04/28/81	jcd	1. Fld Complt. Issd Summs. Case may be ref to Mag Geffen for dscvry.
4/29/81	lp	2. Fld pltf notc of mot & mot for prel inj; memo of P/A. 3. Fld ORD that the instant action sh be consolidated with CV81-1101 LEW(Px) & that pltf's mot for a prel inj stands submitted after filng the briefs in 81-1101.
4/29/81	lp	4. Fld pltf notc of mot & mot for prel inj; memo of P/A, retrnbl on 6/14/81 at 9am.
4/29/81	lp	5. Fld pltf ex parte applic for ord consolidating cases & Ord shortening tim for not of hrng on prel inj, declartn of Jeffrey M. Hamerling. 6. Fld pltf exhbts to memo of Dames & Moore in support of mot for prel inj.
4/30/81	cm	7. Fld ORD(LEW,MRP) transfrng actn to Laughlin E. Waters for all fur procedngs. Case may be referred to magistrate Penne for disc. Parties notfd.
5-8-81	sb	8. Fld pltf's declar of serv
5/13/81	lp	LODGED deft proposed re dismi of pltf's claims.PLAC IN FIL, NOT USED.
5/11/81	lp	9. Fld pltf reply memo of Dames & Moore to amicus curiae memo of certain Bank defts
5/13/81	lp	10. Fld defts memo in supprt of defts' mot to dism & in oppositn to Dames & Moore's brief as Amicus Curiae.
5/13/81	lp	11. Fld defts mot to dism Dames & Moore's complnt for failure to stat a claim upon wh relief may be grnted.
5/13/81	lp	12. Fld deft notc of mot to dism, retrnbl on 6/15/81 at 9am.
5/13/81	lp	13. Fld defts mot to dism Dames & Moore's complnt for failure to stat a claim upon relief may be granted.
5/13/81	lp	14. Fld deft U.S.'s oppositn to Dames & Moore's mot for prel inj, retrnbl on 5/14/81 at 9am.
5/14/81	lp	15. Fld pltf reply memo of pltf to supplemental amicus curiae memo of certain bank defts & memo in supprt of mot to dism of USA.
5-28-81	yd	16. Fld ORD that pltfs motns for prelim injunctn are DENIED. Defts' motns to dism are GRANTED. Cmplnt of Daniel, Mann, Johnson & Mendenhall & Dames & Moore is dismd for failure to state a clm upon which relief may be granted. (ENT 6-2-81) Mld cpys & Notc MD JS 6
*4/28/81	lp	LODGED proposed pltf ord re prel inj. PLAC IN FIL NOT USED.

DATE	NR.	PROCEEDINGS
6/3/81	am	17. Fld pltf's NOTC OF APPEAL to 9th Cir C/A frm Judgmt ent 6/2/81. $70.00 fldng & docket fees pd.
6/8/81	cm	18. Fld ORD(LEW) restraing dfts frm certain actns durng pendncy of appeal. (ENT 6/8/81) mld notc of ent to prties.
6-8-81	yd	19. Fld ORD DENYING modififyng Ord entrd 6-2-81 so that vacatng of attachmnts in CV79-4918 LEW & CV80-277 LEW is stayed only thru 6-15-81. (Stip to hve been made in CV79-4918) (ENT 6-8-81) Mld Notc
6-8-81	yd	20. Fld Memo that Crt's ORD fld 5-28-81, entrd 6-2-81 to ext that if related to CV81-2064-LEW (Px) was made on basis of argumnts presented by Govt. in its motn to dism Dames & Moore's cmplnt for failure to state clm upon which relief may be granted & in Govt's memo in suppt of deft's motn to dism & in opp to Dame & Moore's brief as Amicus Curiae (ENT 6-8-81) Mld cpy & Notc
6-8-81	yd	21. Fld ORD that during pendency of appeal in CV81-2064-LEW (Px) defts are retrained fr transferrng or requirng any other person to transfer fr their present locatns, any property or assets of Govt. of Iran or any of its agencies, instrumentalities, controlled entities or persons or affiliates which is subj to any writ of attachmnt, garnishmnt, jdmnt, levy or other judicial lien, issd by this Crt or any other Crt in favr of Dames & Moore (ENT 6-8-81) Mld Notc

Notice of Motion and Motion for Preliminary Injunction; Memorandum of Points and Authorities. Date: May 14, 1981. Time: 9:00 a.m.

United States District Court, Central District of California.

Dames & Moore, Plaintiff, v. Donald T. Regan, The Secretary of the Treasury of the United States of America, and The United States of America, Defendants. Case No. 81-2064.

TO: ALL PARTIES AND THE UNITED STATES ATTORNEY AND THE ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA:

PLEASE TAKE NOTICE that on Thursday, May 14, 1981, at the hour of 9:00 a.m., or as soon thereafter as the matter may be heard in the above-entitled Court, located at 312 North Spring Street, Los Angeles, California, Plaintiff will and does hereby move the Court for a preliminary injunction restraining defendants during the pendency of this proceeding from taking any action to nullify, interfere with, or abrogate:

(a) The final judgment entered by this Court on February 18, 1981, in *Dames & Moore v. Atomic Energy Organization of Iran et al.*, (CV 79-04918 LEW (Px)); and/or

(b) Plaintiff's attempts to execute on that final judgment, including, but not limited to those which have commenced in the State of Washington; and/or

(c) Plaintiff's prejudgment attachments against property of defendants in *Dames & Moore v. Atomic Energy Organization of Iran et al.* (CV 79-04918 LEW (Px)); and/or

(d) Plaintiff's right to continue to enforce and prosecute its claims against those defendants against those defendants against which no judgment has been obtained in *Dames*

& Moore v. Atomic Energy Organization of Iran et al. (CV 79-04918 LEW (Px)).

This Motion is based upon this Notice, the documents filed and served herewith, the file, documents and all evidence, oral or written, as may be presented at hearing.

Dated: April 27, 1981.

Respectfully submitted,
TUTTLE & TAYLOR Incorporated
MERLIN W. CALL
C. STEPHEN HOWARD
WILLIAM C. SCHWEINFURTH
JEFFREY M. HAMERLING
/s/ Jeffrey M. Hamerling
Jeffrey M. Hamerling, a member of
the law firm of TUTTLE & TAYLOR
Incorporated, Attorneys for
Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff Dames & Moore herein incorporates by reference and attaches hereto as Exhibit A the MEMORANDUM OF DAMES & MOORE, AMICUS CURIAE, IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION in *Daniel, Mann, Johnson & Mendenhall v. Donald T. Regan, and The United States of America*, Case No. CV 81-1101 LEW (Px). Dames & Moore also incorporates by reference its verified complaint in this action.

For the reasons set forth in the attached memorandum and the verified complaint, Dames & Moore respectfully requests that the Court issue a preliminary injunction.

Dated: April 27, 1981.

Respectfully submitted,

TUTTLE & TAYLOR Incorporated
MERLIN W. CALL
C. STEPHEN HOWARD
WILLIAM C. SCHWEINFURTH
JEFFREY M. HAMERLING
/s/ Jeffrey M. Hamerling
Jeffrey M. Hamerling, a member of
the law firm of TUTTLE & TAYLOR
Incorporated, Attorneys for
Plaintiff

DECLARATION OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 609 South Grand Avenue, Los Angeles, California 90017.

On April 28, 1981, I served the foregoing document described as NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES on the parties in this action by causing a true copy thereof to be delivered by Federal Express Courier Service to the offices of:

William Black, Esq.
Department of Justice-Civil Division
Room 3338
9th & Pacific Avenue, N.W.
Washington, D.C. 20530

and by causing a true copy thereof to be delivered to the offices of:

Dzintra I. Janavs, Esq.
Assistant United States Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Executed on April 28, 1981, at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Delilah A. Phiefer
Delilah A. Phiefer

No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

DAMES & MOORE, a partnership,
Petitioner,

v.

DONALD T. REGAN, the Secretary
of the Treasury of the United States
of America, and THE UNITED STATES OF AMERICA,
Respondents,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE ATOMIC ENERGY ORGANIZATION OF
THE ISLAMIC REPUBLIC OF IRAN,
and
BANK MARKAZI IRAN
Intervenor-Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit Before Judgment

APPENDIX TO BRIEF FOR INTERVENOR-RESPONDENT THE ISLAMIC REPUBLIC OF IRAN

THOMAS G. SHACK, JR.
Counsel of Record
RAYMOND J. KIMBALL
GREGORY DE SOUSA
CHRISTINE COOK NETTESHEIM

ABOUREZK, SHACK &
MENDENHALL, P.C.
1129 Twentieth Street, N.W.
Washington, D.C. 20036
(202) 293-5900

Counsel for Intervenor-Respondent Islamic Republic of Iran

On the Brief:
JOHN B. BEATY
JAMES A. STENGER
THOMAS D. SILVERSTEIN

TABLE OF AUTHORITIES

Executive Orders and Regulations

	Page
Exec. Order 12,170, 44 Fed. Reg. 65,729 (1979)	1a
Exec. Order 12,276, 46 Fed. Reg. 7,913 (1981)	2a
Iranian Assets Control Regulations	
31 C.F.R. §§535.101-535.904 (1980)	5a
§535.101	8a
§535.201	9a
§535.202	9a
§535.203	9a
§535.204	11a
§535.206	12a
§535.207	13a
§535.208	14a
§535.209	14a
§535.301	15a
§535.308	16a
§535.310	16a
§535.311	16a
§535.312	17a
§535.316	17a
§535.317	17a
§535.318	17a
§535.320	17a
§535.321	18a
§535.329	18a
§535.331	19a
§535.401	19a
§535.402	19a
§535.403	19a
§535.413	20a
§535.414	20a
§535.415	21a
§535.416	21a

	Page
§535.418	23a
§535.419	23a
§535.420	24a
§535.421	24a
§535.422	24a
§535.423	25a
§535.424	25a
§535.425	25a
§535.426	26a
§535.427	26a
§535.428	26a
§535.429	27a
§535.430	27a
§535.431	27a
§535.432	28a
§535.502	28a
§535.503	29a
§535.504	29a
§535.508	30a
§535.528	31a
§535.531	32a
§535.532	33a
§535.550	34a
§535.562	34a
§535.563	36a
§535.566	36a
§535.567	36a
§535.568	37a
§535.569	38a
§535.572	39a
§535.574	39a
§535.575	39a
§535.576	39a
§535.577	40a
§535.578	40a
§535.601	41a

	Page
§535.602	41a
§535.603	41a
§535.615	42a
§535.616	43a
§535.701	44a
§535.801	45a
§535.802	47a
§535.803	47a
§535.804	47a
§535.805	48a
§535.806	48a
§535.901	48a
§535.902	49a
§535.904	49a
44 Fed. Reg. 65,956 (1979) (to be codified in 31 C.F.R. §535.201)	50a
46 Fed. Reg. 14,334 (1981), *as amended*, 46 Fed. Reg. 26,477 (1981), 46 Fed. Reg. 30,341 (1981), 46 Fed. Reg. 31,630 (1981) (to be codified in 31 C.F.R. §535.213)	51a
46 Fed. Reg. 14,334 (1981), *as amended*, 46 Fed. Reg. 26,477 (1981), 46 Fed. Reg. 30,341 (1981), 46 Fed. Reg. 31,630 (1981) (to be codified in 31 C.F.R. §535.214)	53a
46 Fed. Reg. 14,334 (1981), *as amended*, 46 Fed. Reg. 26,477 (1981), 46 Fed. Reg. 31,630 (1981) (to be codified in 31 C.F.R. §535.215)	54a
46 Fed. Reg. 14,335 (1981) (to be codified in 31 C.F.R. §535.221)	55a
46 Fed. Reg. 30,341 (1981) (to be codified in 31 C.F.R. §535.221)	57a
46 Fed. Reg. 30,340 (1981)	59a
46 Fed. Reg. 14,337 (1981)	61a

Executive Order 12,170,
44 Fed. Reg. 65,729 (1979)

Pursuant to the authority vested in me as President by the Constitution and laws of the United States including the International Emergency Economic Powers Act, 50 U.S.C.A. sec. 1701 *et seq.*, the National Emergencies Act, 50 U.S.C. sec. 1601 *et seq.*, and 3 U.S.C. sec. 301.

I, JIMMY CARTER, President of the United States, find that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and hereby declare a national emergency to deal with that threat.

I hereby order blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.

The Secretary of the Treasury is authorized to employ all powers granted to me by the International Emergency Economic Powers Act to carry out the provisions of this order.

This order is effective immediately and shall be transmitted to the Congress and published in the **Federal Register.**

JIMMY CARTER

THE WHITE HOUSE,
November 14, 1979.

Executive Order 12,276,
46 Fed. Reg. 7,913 (1981)

Direction Relating to Establishment of Escrow Accounts

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran, it is hereby ordered that as of the effective date of this Order:

1-101. The Secretary of the Treasury is authorized to enter into, and to license, authorize, direct, and compel any appropriate official and/or the Federal Reserve Bank of New York, as fiscal agent of the United States, to enter into escrow or related agreements with a foreign central bank and with the Central Bank of Algeria under which certain money and other assets, as and when directed by the Secretary of the Treasury, shall be credited by the foreign central bank to an escrow account on its books in the name of the Central Bank of Algeria, for transfer to the Government of Iran if and when the Central Bank of Algeria receives from the Government of Algeria a certification that the 52 U.S. diplomats and nationals being held hostage in Iran have safely departed from Iran. Such agreements shall include other parties and terms as determined by the Secretary

of the Treasury to be appropriate to carry out the purposes of this Order.

1-102. The Secretary of the Treasury is authorized to license, authorize, direct, and compel the Federal Reserve Bank of New York, as fiscal agent of the United States, to receive certain money and other assets in which Iran or its agencies, instrumentalities, or controlled entities have an interest and to hold or transfer such money and other assets, and any interest earned thereon, in such a manner as he deems necessary to fulfill the rights and obligations of the United States under the Declaration of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, and the escrow and related agreements described in paragraph 1-101 of this Order. Such money and other assets may be held in interest-bearing form and where possible shall be invested with or through the entity holding the money or asset on the effective date of this Order.

1-103. Compliance with this Executive Order, any other Executive Order licensing, authorizing, directing or compelling the transfer of the assets referred to in paragraphs 1-101 and 1-102 of this Order, or any regulations, instructions, or directions issued thereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, such orders, regulations, instructions, or directions.

1-104. The Attorney General shall seek to intervene in any litigation within the United States which arises out of this Order and shall, among other things, defend the legality of, and all actions taken pursuant to, each of its provisions.

1-105. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purposes of this Order.

1-106. This Order shall be effective immediately.

JIMMY CARTER

THE WHITE HOUSE,
January 19, 1981.

IRANIAN ASSETS CONTROL REGULATIONS
31 C.F.R. §§535.101-535.904 (1980)

Subpart A—Relation of This Part to Other Laws and Regulations

Sec.

535.101 Relation of this part to other laws and regulations.

Subpart B—Prohibitions

535.201 Transactions involving property in which Iran or Iranian entities have an interest.
535.202 Transactions with respect to securities registered or inscribed in the name of Iran.
535.203 Effect of transfers violating the provisions of this part.
535.204 Imports from Iran or Iranian merchandise.
535.206 Financial transactions.
535.207 Trade, shipping and service transactions.
535.208 Evasions; effective date.
535.209 Transactions incident to travel and maintenance of U.S. nationals in Iran prohibited.

Subpart C—General Definitions

535.301 Iran; Iranian Entity.
535.308 Person.
535.310 Transfer.
535.311 Property; property interests.
535.312 Interest.
535.316 License.
535.317 General License.
535.318 Specific License.
535.320 Domestic Bank.
535.321 United States; continental United States.
535.329 Person subject to the jurisdiction of the United States.
535.331 Food.

Subpart D—Interpretations

Sec.

535.401 Reference to amended sections.
535.402 Effect of amendment of sections of this part or of other orders, etc.
535.403 Termination and acquisition of an interest of Iran or an Iranian entity.
535.413 Transfers between dollar accounts held for foreign banks.
535.414 Payments to blocked accounts under § 535.508.
535.415 Payment by Iranian entities of obligations to persons within the United States.
535.416 Letters of credit.
535.418 Authorization of judicial proceedings under § 535.504.
535.419 Extensions of credit to Iran.
535.420 Transfers of accounts under § 535.508 from demand to interest-bearing status.
535.421 Prior contractual commitments not a basis for licensing.
535.422 New deposit facilities.
535.423 Customary international commercial terms.
535.424 Service contracts in support or industrial projects in Iran.
535.425 Iranian enterprises.
535.426 Remittances involving persons in Iran.
535.427 Dividends, interest, and other periodic payments to Iran.
535.428 Sponsored travel and maintenance of U.S. nationals in Iran.
535.429 Exportation of technical data prohibited.
535.430 U.S. components of foreign-made goods.
535.431 Goods in transit.
535.432 Provision of travel-related services.

Subpart E—Licenses, Authorizations and Statements of Licensing Policy

535.502 Effect of license or authorization.
535.503 Exclusion from licenses and authorizations.

Sec.
535.504 Certain judicial proceedings with respect to property of Iran or Iranian entities.
535.508 Payments to blocked accounts in domestic banks.
535.528 Certain transactions with respect to Iranian patents, trademarks and copyrights authorized.
535.531 Payment of certain checks and drafts.
535.532 Completion of certain securities transactions.
535.550 Publications, films, etc. from Iran.
535.562 News materials.
535.563 Family remittances to Iran.
535.566 Unblocking of foreign currency deposits held by U.S.-owned or controlled foreign firms.
535.567 Payment under advised letters of credit.
535.568 Certain standby letters of credit and performance bonds.
535.569 Licensed letter of credit transactions; forwarding of documents.
535.572 Authorizations of exports of certain types of goods to Iran.
535.574 Service contracts in support of telecommunications in Iran.
535.575 Exports of newspapers, magazines, films, etc. to Iran.
535.576 Payments of non-dollar letters of credit to Iran.
535.577 Household goods and personal effects.
535.578 Passengers' baggage and personal effects.

Subpart F—Reports

535.601 Reports.
535.602 Reports to be furnished on demand.
535.603 Report of proposed subsidiary transaction with Iran.
535.615 Reports on Form TFR-615.
535.616 Reports on Form TFR-616.

Subpart G—Penalties

535.701 Penalties.

Subpart H—Procedures

Sec.

535.801 Licensing.
535.802 Unblocking.
535.803 Decision.
535.804 Records and reporting.
535.805 Amendment, modification, or revocation.
535.806 Rule making.

Subpart I—Miscellaneous Provisions

535.901 Dollar Accounts at banks abroad.
535.902 Set-offs by U.S. owned or controlled firms abroad.
535.904 Payment by Iranian entities of obligations to persons within the United States.

AUTHORITY: SECS. 201-207, 91 Stat. 1626; 50 U.S.C. 1701-1706; E.O. No. 12170, 44 FR 65729; E.O. 12205, 45 FR 24099; E.O. 12211, 45 FR 20685.

SOURCE: 44 FR 65956, Nov. 15, 1979, unless otherwise noted.

Subpart A—Relation of This Part to Other Laws and Regulations

§ 535.101 Relation of this part to other laws and regulations.

(a) This part is independent of Parts 500, 505, 515, 520 and 530 of this chapter. Those parts do not relate to Iran. No license or authorization contained in or issued pursuant to such parts shall be deemed to authorize any transaction prohibited by this part, nor shall any license or authorization issued pursuant to any other provision of law (except this part) be deemed to authorize any transaction so prohibited.

(b) No license or authorization contained in or issued pursuant to this part shall be deemed to authorize any transaction to the extent that it is prohibited by reason of the provisions of any law or any statute other than the International Emergency Economic Powers Act, as amended, or any proclamation order or regulation other than those contained in or issued pursuant to this part.

Subpart B—Prohibitions

§ 535.201 Transactions involving property in which Iran or Iranian entities have an interest.

No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after the effective date Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized.

[45 FR 24432, Apr. 9, 1980]

§ 535.202 Transactions with respect to securities registered or inscribed in the name of Iran.

Unless authorized by a license expressly referring to this section, the acquisition, transfer (including the transfer on the books of any issuer or agent thereof), disposition, transportation, importation, exportation, or withdrawal of, or the endorsement or guaranty of signatures on or otherwise dealing in any security (or evidence thereof) registered or inscribed in the name of any Iranian entity is prohibited irrespective of the fact that at any time (either prior to, on, or subsequent to the effective date) the registered or inscribed owner thereof may have, or appears to have, assigned, transferred or otherwise disposed of any such security.

§ 535.203 Effect of transfers violating the provisions of this part.

(a) Any transfer after the effective date which is in violation of any provision of this part or of any regulation, ruling, instruction, license, or other direction or authorization thereunder and involves any property in which Iran has or has had an interest since such effective date is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power or privilege with respect to such property.

(b) No transfer before the effective date shall be the basis for the assertion or recognition of any right, remedy, power, or

privilege with respect to, or interest in, any property in which Iran has or has had an interest since the effective date unless the person with whom such property is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to such effective date.

(c) Unless otherwise provided, an appropriate license or other authorization issued by or pursuant to the direction or authorization of the Secretary of the Treasury before, during or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of the International Emergency Economic Powers Act and this part and any ruling, order, regulation, direction or instruction issued hereunder.

(d) Transfers of property which otherwise would be null and void, or unenforceable by virtue of the provisions of this section shall not be deemed to be null and void, or unenforceable pursuant to such provisions, as to any person with whom such property was held or maintained (and as to such person only) in cases in which such person is able to establish each of the following:

(1) Such transfer did not represent a willful violation of the provisions of this part by the person with whom such property was held or maintained;

(2) The person with whom such property was held or maintained did not have reasonable cause to know or suspect, in view of all the facts and circumstances known or available to such person, that such transfer required a license or authorization by or pursuant to the provision of this part and was not so licensed or authorized or if a license or authorization did purport to cover the transfer, that such license or authorization had been obtained by misrepresentation or the withholding of material facts or was otherwise fraudulently obtained; and

(3) Promptly upon discovery that: (i) Such transfer was in violation of the provisions of this part or any regulation, ruling, instruction, license or other direction or authorization thereunder, or (ii) Such transfer was not licensed or authorized by the Secretary of the Treasury, or

(iii) If a license did purport to cover the transfer, such license had been obtained by misrepresentation or the withholding of material facts or was otherwise fraudulently obtained; the person with whom such property was held or maintained filed with the Treasury Department, Washington, D.C., a report in triplicate setting forth in full the circumstances relating to such transfer. The filing of a report in accordance with the provisions of this paragraph shall not be deemed to be compliance or evidence of compliance with paragraphs (d)(1) and (2) of this section.

(e) Unless licensed or authorized pursuant to this part any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since the effective date there existed an interest of Iran.

(f) For the purpose of this section the term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in Section 2(1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

[44 FR 65956, Nov. 15, 1979, as amended at 45 FR 24432, Apr. 9, 1980]

§ 535.204 Imports from Iran or Iranian merchandise.

Except as specifically authorized by the Secretary of the Treasury (or by any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, no merchandise, other goods or services of Iranian origin may be imported into the United States if such

merchandise or goods are or have been located in or transported from or through Iran after the effective date of this section.

[45 FR 26940, Apr. 21, 1980]

§ 535.206 Financial transactions.

(a) Except as authorized by means of regulations, rulings, instructions, licenses or otherwise, no person subject to the jurisdiction of the United States shall, directly or indirectly, in any transaction involving Iran, an Iranian governmental entity, an enterprise controlled by Iran or an Iranian governmental entity, or any person in Iran:

(1) Make available any new deposit facilities or allow substantial increases in existing non-dollar deposits.

(2) Allow more favorable terms of payment than customarily used in international commercial transactions.

(3) Fail to act in a business-like manner in exercising any rights when payments due on existing credits or loans are not made in a timely manner, provided the exercise of such rights is not otherwise prohibited by this part.

(4) Make any payment, transfer of credit, or other transfer of funds or other property or interests therein to any person in Iran.

(b) The prohibitions contained in paragraph (a) of this section shall not apply to transactions by any person subject to the jurisdiction of the United States which is a non-banking association, corporation or other organization organized and doing business under the laws of any foreign country. The U.S. parent of any such person must report to the Office of Foreign Assets Control any prospective transaction with Iran contained in paragraph (a) of this section ten days before any subsidiary enters into such a transaction.

[45 FR 24432, Apr. 9, 1980, as amended at 45 FR 26940, Apr. 21, 1980]

§ 535.207 Trade, shipping and service transactions.

(a) All of the following transactions are prohibited, except as authorized by means of regulations, rulings, instructions, licenses or otherwise:

(1) The sale, supply or other transfer, by any person subject to the jurisdiction of the United States, of any items, commodities or products, except food, medicine or supplies intended strictly for medical purposes, and donations of clothing intended to be used to relieve human suffering, from the United States, or from any foreign country, whether or not originating in the United States, either to or destined for Iran, an Iranian governmental entity in Iran, any other person or body in Iran, or any other person or body for the purposes of any enterprise carried on in Iran.

(2) The shipment by vessel, aircraft, railway or other land transport of United States registration or owned by or under charter to a person subject to the jurisdiction of the United States or the carriage (whether or not in bond) by land transport facilities across the United States of any of the items, commodities or products covered by paragraph (a) of this section which are consigned to or destined for Iran, an Iranian governmental entity, or any person or body in Iran, or to any enterprise carried on in Iran.

(3) The shipment from the United States of items, products or commodities covered by paragraph (a) of this section on vessels or aircraft registered in Iran.

(4) The engaging, by any person subject to the jurisdiction of the United States, in any service contract in support of industrial projects in Iran, except any such contracts entered into prior to the effective date or concerned with the provision of medical services.

(b) The prohibitions contained in paragraph (a) of this section shall not apply to transactions by any person subject to the jurisdiction of the United States which is a non-banking association, corporation or other organization organized and doing business under the laws of any foreign country. The U.S. parent of any such person must report to the Office of Foreign

Assets Control any transaction with Iran contained in paragraph (a) of this section ten days before any subsidiary enters into such a transaction.

[45 FR 24433, Apr. 9, 1980]

§ 535.208 Evasions; effective date.

(a) Any transaction for the purpose of, or which has the effect of, evading or avoiding any of the prohibitions set forth in this subpart is hereby prohibited.

(b) The term "effective date" means, with respect to transactions prohibited in § 535.201, 8:10 a.m. eastern standard time, November 14, 1979, and with respect to the transactions prohibited in §§ 535.206 and 535.207, 4:19 p.m. eastern standard time, April 7, 1980.

(c) With respect to any amendments of the foregoing sections or any other amendments to this part the term "effective date" shall mean the date of filing with the FEDERAL REGISTER.

[45 FR 24433, Apr. 9, 1980, as amended at 45 FR 26940, Apr. 21, 1980]

§ 535.209 Transactions incident to travel and maintenance of U.S. nationals in Iran prohibited.

(a) The following actions by persons subject to the jurisdiction of the United States are prohibited:

(1) Any direct or indirect payment or transaction (including any transfer, other dealing in, or use of property) either to, by, on behalf of, or otherwise involving, any foreign country or any national thereof, which is incident to travel to, or travel or maintenance within Iran of any individual who is a U.S. citizen or U.S. permanent resident alien.

(b) The prohibitions of paragraph (a) of this section do not apply to transactions incident to travel to or travel or maintenance within Iran of individuals who are citizens of Iran.

(c) The effective date of this prohibition, as it relates to payments by or for the benefit of U.S. citizens or U.S. permanent resident aliens in Iran is April 24, 1980.

[45 FR 26940, Apr. 21, 1980; 45 FR 37688, June 4, 1980]

Subpart C—General Definitions

§ 535.301 Iran; Iranian Entity.

(a) The term "Iran" and "Iranian Entity" includes:

(1) The state and the Government of Iran as well as any political subdivision, agency, or instrumentality thereof or any territory, dependency, colony, protectorate, mandate, dominion, possession or place subject to the jurisdiction thereof;

(2) Any partnership, association, corporation, or other organization substantially owned or controlled by any of the foregoing;

(3) Any person to the extent that such person is, or has been or to the extent that there is reasonable cause to believe that such person is, or has been, since the effective date acting or purporting to act directly or indirectly on behalf of any of the foregoing;

(4) Any territory which on or since the effective date is controlled or occupied by the military, naval or police forces or other authority of Iran; and

(5) Any other person or organization determined by the Secretary of the Treasury to be included within paragraph (a) hereof.

(b) A person specified in paragraph (a)(2) of this section shall not be deemed to fall within the definition of Iran solely by reason of being located in, organized under the laws of, or having its principal place of business in, Iran.

§ 535.308 Person.

The term "person" means an individual, partnership, association, corporation or other organization.

[45 FR 24433, Apr. 9, 1980]

§ 535.310 Transfer.

The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and, without limitation upon the foregoing, shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or fiduciary; the creation or transfer of any lien; the issuance, docketing, filing or the levy of or under any judgement, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power.

[44 FR 75352, Dec. 19, 1980]

§ 535.311 Property; property interests.

Except as defined in § 535.203(f) for the purposes of that section, the terms "property" and "property interest" or "property interests" shall include, but not by way of limitation, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, debentures, stocks, bonds, coupons, any other financial securities, bankers' acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, powers of attorney, goods, wares, merchandise, chattels, stocks

on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, real estate and any interest therein, leaseholds, ground rents, options negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.

§ 535.312 Interest.

Except as otherwise provided in this part, the term "interest" when used with respect to property shall mean an interest of any nature whatsoever, direct or indirect.

[44 FR 75352, Dec. 19, 1979]

§ 535.316 License.

Except as otherwise specified, the term "license" shall mean any license or authorization contained in or issued pursuant to this part.

[44 FR 66832, Nov. 21, 1979]

§ 535.317 General license.

A general license is any license or authorization the terms of which are set forth in this part.

[44 FR 66832, Nov. 21, 1979]

§ 535.318 Specific license.

A specific license is any license or authorization issued pursuant to this part but not set forth in this part.

[44 FR 66832, Nov. 21, 1979]

§ 535.320 Domestic bank.

(a) The term "domestic bank" shall mean any branch or office within the United States of any of the following which is

not Iran or an Iranian entity: any bank or trust company incorporated under the banking laws of the United States or of any state, territory, or district of the United States, or any private bank or banker subject to supervision and examination under the banking laws of the United States or of any state, territory or district of the United States. The Secretary of the Treasury may also authorize any other banking institution to be treated as a "domestic bank" for the purpose of this definition or for the purpose of any or all sections of this part.

(b) For purposes of §§ 535.413, 535.508, 535.531 and 535.901, the term "domestic bank" includes any branch or office within the United States of a non-Iranian foreign bank.

[44 FR 66832, Nov. 21, 1979]

§ 535.321 United States; continental United States.

The term "United States" means the United States and all areas under the jurisdiction or authority thereof including the Trust Territory of the Pacific Islands. The term "continental United States" means the states of the United States and the District of Columbia.

[44 FR 66833, Nov. 21, 1979]

§ 535.329 Person subject to the jurisdiction of the United States.

The term "person subject to the jurisdiction of the United States" includes:

(a) Any person wheresoever located who is a citizen or resident of the United States;

(b) Any person actually within the United States;

(c) Any corporation organized under the laws of the United States or of any state, territory, possession, or district of the United States; and

(d) Any partnership, association, corporation, or other organization wheresoever organized or doing business which is owned or controlled by persons specified in paragraphs (a), (b), or (c) of this section.

§ 535.331 Food.

The term "food" as used in §535.207(a) shall include commodities directly consumed by humans or by animals when such animals are primarily used as a source of food.

[45 FR 24433, Apr. 9, 1980]

Subpart D—Interpretations

§ 535.401 Reference to amended sections.

Reference to any section of this part or to any regulation, ruling, order, instruction, direction or license issued pursuant to this part shall be deemed to refer to the same as currently amended unless otherwise so specified.

[45 FR 24433, Apr. 9, 1980]

§ 535.402 Effect of amendment of sections of this part or of other orders, etc.

Any amendment, modification, or revocation of any section of this part or of any order, regulation, ruling, instruction, or license issued by or under the direction of the Secretary of the Treasury pursuant to section 203 of the International Emergency Economic Powers Act shall not, unless otherwise specifically provided, be deemed to affect any act done or omitted to be done, or any suit or proceeding had or commenced in any civil or criminal case, prior to such amendment, modification, or revocation and all penalties, forfeitures, and liabilities under any such order, regulation, ruling, instruction or license shall continue and may be enforced as if such amendment, modification, or revocation had not been made.

[45 FR 24433, Apr. 9, 1980]

§ 535.403 Termination and acquisition of an interest of Iran or an Iranian entity.

(a) Whenever a transaction licensed or authorized by or pursuant to this part results in the transfer of property (including any property interest) away from Iran or an Iranian entity, such property shall no longer be deemed to be property in which Iran or an Iranian entity has or has had an interest,

unless there exists in the property another such interest the transfer of which has not been effected pursuant to license or other authorization.

(b) Unless otherwise specifically provided in a license or authorization contained in or issued pursuant to this part, if property (including any property interest) is transferred to Iran or an Iranian interest, such property shall be deemed to be property in which there exists an interest of Iran or an Iranian entity.

[45 FR 24433, Apr. 9, 1980]

§ 535.413 Transfers between dollar accounts held for foreign banks.

Transfers authorized by § 535.901 include transfers by order of a non-Iranian foreign bank from its account in a domestic bank (directly or through a foreign branch or subsidiary of a domestic bank) to an account held by a domestic bank (directly or through a foreign branch or subsidiary) for a second non-Iranian foreign bank which in turn credits an account held by it abroad for Iran. For the purposes of this section, a non-Iranian foreign bank means a bank which is not a person subject to the jurisdiction of the United States.

[44 FR 66833, Nov. 21, 1979]

§ 535.414 Payments to blocked accounts under § 535.508.

(a) Section 535.508 does not authorize any transfer from a blocked account within the United States to an account held by any bank outside the United States or any other payment into a blocked account outside the United States.

(b) Section 535.508 only authorizes payment into a blocked account held by a domestic bank as defined by § 535.320.

[44 FR 67617, Nov. 26, 1979]

§ 535.415 Payment by Iranian entities of obligations to persons within the United States.

A person receiving payment under § 535.904 may distribute all or part of that payment to anyone: *Provided,* That any such payment to Iran or an Iranian entity must be to a blocked account in a domestic bank.

[44 FR 67617, Nov. 26, 1979]

§ 535.416 Letters of credit.

(a) *Q.* Prior to the effective date, a bank subject to the jurisdiction of the United States has issued or confirmed a documentary letter of credit for a non-Iranian account party in favor of an Iranian entity. Can payment be made upon presentation of documentary drafts?

A. Yes, provided payment is made into a blocked account in a domestic bank.

(b) *Q.* Prior to the effective date, a domestic branch of a bank organized or incorporated under the laws of the United States has issued or confirmed a documentary letter of credit for a non-Iranian account party in favor of an Iranian entity. Payment is to be made through a foreign branch of the bank. Can payment be made upon presentation of documentary drafts?

A. Yes, provided payment is made into a blocked account in a domestic bank.

(c) *Q.* Prior to the effective date, a foreign bank confirms a documentary letter of credit issued by its U.S. agency or branch for a non-Iranian account party in favor of an Iranian entity. Can the U.S. agency or branch of the foreign bank transfer funds to the foreign bank in connection with that foreign bank's payment under the letter of credit?

A. No, the U.S. agency's payment is blocked, unless the foreign bank made payment to the Iranian entity prior to the effective date.

(d) *Q.* Prior to the effective date, a bank subject to the jurisdiction of the United States has issued or confirmed a

documentary letter of credit for a non-Iranian account party in favor of an Iranian entity. The Iranian entity presents documentary drafts which are deficient in some detail. May the non-Iranian account party waive the documentary deficiency and authorize the bank to make payment?

A. Yes, provided payment is made into a blocked account in a domestic bank. However, the non-Iranian account party is not obligated by these Regulations to exercise a waiver of documentary deficiencies. In cases where such a waiver is not exercised, the bank's payment obligation, if any, under the letter of credit remains blocked, as does any obligation, contingent or otherwise, of the account party. The documents are also blocked.

(e) *Q.* Prior to the effective date, a bank subject to the jurisdiction of the United States has issued or confirmed a documentary letter of credit for a non-Iranian account party in favor of an Iranian entity. The Iranian entity does not make timely, complete, or proper presentation of documents, and the letter of credit expires. Does there remain a blocked payment obligation held by the bank?

A. No, but any documents held by the bank continue to be blocked. It is also possible that the account party still has a related obligation to the Iranian entity and any such obligation would be blocked.

(f) *Q.* A Bank subject to the jurisdiction of the United States has issued a letter of credit for a U.S. account party in favor of an Iranian entity. The letter of credit is confirmed by a foreign bank. Prior to or after the effective date, the Iranian entity presents documents to the U.S. issuing bank. Payment is deferred. After the effective date, the Iranian entity requests that the issuing bank either return the documents to the Iranian entity or transfer them to the confirming bank. Can the issuing bank do so?

A. No, the U.S. issuing bank can neither return nor transfer the documents without a license. The documents constitute blocked property under the Regulations.

(g) *Q.* Prior to the effective date, a bank subject to the jurisdiction of the United States has issued or confirmed a documentary letter of credit for a non-Iranian account party in favor of an Iranian entity. The Iranian entity presents documentary drafts which are deficient in some detail. May the non-Iranian account party waive the documentary deficiency and make payment?

A. Yes, provided payment is made into a blocked account in a domestic bank. However, the non-Iranian account party is not obligated by these Regulations to exercise a waiver of documentary deficiencies. In cases where such a waiver is not exercised, the amount of the payment held by the account party is blocked.

[44 FR 69287, Dec. 3, 1979, as amended at 44 FR 75353, Dec. 19, 1979]

§ 535.418 Authorization of judicial proceedings under § 535.504.

The general authorization for judicial proceedings contained in § 535.504(a) includes pre-judgement attachment. However, § 535.504(a) does not authorize payment or delivery of any blocked property to any court, marshal, sheriff, or similar entity, and any such transfer of blocked property is prohibited without a specific license. It would not be consistent with licensing policy to issue such a license.

[44 FR 75353, Dec. 19, 1979]

§ 535.419 Extensions of credit to Iran.

(a) § 535.201 prohibits the unlicensed extension of credit to Iran or any Iranian entity, by persons subject to the jurisdiction of the United States, after the effective date.

(b) This prohibition applies to the unlicensed renewal of credits in existence on the effective date.

(c) This prohibition applies to credit extended in any currency.

(d) In view of the provisions of §§ 535.566 and 535.901, the prohibition does not apply to trade credits which are fully collateralized in foreign currency or in unblocked U.S. dollars received after the effective date.

(e) The prohibition in § 535.201 does not apply to extensions or renewals of credits to Iran or an Iranian entity by any person subject to the jurisdiction of the United States which is a non-banking association, corporation or other organization organized and doing business under the laws of any foreign country.

[44 FR 76784, Dec. 28, 1979, as amended at 45 FR 24433, Apr. 9, 1980]

§ 535.420 Transfers of accounts under § 535.508 from demand to interest-bearing status.

§ 535.508 authorizes transfer of a blocked demand deposit account to interest-bearing status at the instruction of the Iranian depositor at any time.

[44 FR 76784, Dec. 28, 1979]

§ 535.421 Prior contractual commitments not a basis for licensing.

Specific licenses are not issued on the basis that an unlicensed firm commitment or payment has been made in connection with a transaction prohibited by this part. Contractual commitments to engage in transactions subject to the prohibitions of this part should not be made, unless the contract specifically states that the transaction is authorized by general license or that it is subject to the issuance of a specific license.

[45 FR 24433, Apr. 9, 1980]

§ 535.422 New deposit facilities.

(a) The prohibition contained in § 535.206(a) includes the opening of any new accounts as well as the acceptance of non-dollar deposits in any existing accounts where the resulting balance would be substantially greater than that existing on the effective date.

(b) A balance is substantially greater if it is more than 10% greater than the average daily balance during the six-month period prior to the effective date of § 535.206.

(c) An account is not a new account if it is established as a result of a transfer authorized by § 535.508 or otherwise licensed under this part.

[45 FR 24434, Apr. 9, 1980]

§ 535.423 Customary international commercial terms.

(a) § 535.206(b) prohibits the sale to Iran, any Iranian entity or any person in Iran of any commodity on conditions markedly different from those customarily offered by other sellers of that commodity in terms of price, method of payment and time or payment.

(b) This section shall not be construed to authorize any transaction which is otherwise prohibited by this part.

[45 FR 24434, Apr. 9, 1980]

§ 535.424 Service contracts in support of industrial projects in Iran.

Specific licenses to enter into any service contract in support of any enterprise in Iran will be considered on a case-by-case basis. No service contract should be entered into without a specific license.

[45 FR 24434, Apr. 9, 1980]

§ 535.425 Iranian enterprise.

For purposes of § 535.206, the term "enterprise" means any business or commercial activity or venture of any kind whatsoever, whether operated or organized as a corporation, partnership, joint venture, association, sole proprietorship, or otherwise.

[45 FR 24434, Apr. 9, 1980]

§ 535.426 Remittances involving persons in Iran.

(a) Remittances to countries other than Iran are not prohibited by § 535.206(a)(4) unless the remitter knows or has reasonable cause to believe that the funds are being transferred directly or indirectly to Iran.

(b) Subject to the requirement of paragraph (c) of this section, liability of a U.S. bank under § 535.206(a)(4) in connection with a payment made on the order of a party other than the bank is limited to the following transactions:

(1) Payment from an account held by the bank for a person located in Iran;

(2) Payment from any other account where the bank has actual and current knowledge of facts that give reasonable cause to believe that the payment is being made in violation of § 535.206(a)(4).

(c) U.S. banks are required to disseminate information about the prohibitions contained in § 535.206(a)(4) and the provisions of this section to all officers and employees.

[45 FR 29287, May 2, 1980]

§ 535.427 Dividends, interest, and other periodic payments to Iran.

The prohibition of transfers to persons in Iran contained in § 535.206(a)(4) applies to all payments and transfers, including payment or transfer of dividend checks, interest payments and other periodic payments.

[45 FR 29287, May 2, 1980]

§ 535.428 Sponsored travel and maintenance of U.S. nationals in Iran.

The receipt or acceptance by any person who is a U.S. citizen or U.S. permanent resident alien of any gratuity, grant, or support in the form of meals, lodging, payments of travel or maintenance expenses, or otherwise, in connection with travel

to or travel and maintenance within Iran constitutes a transaction or transfer within the meaning of the prohibition set forth in § 535.209(a).

[45 FR 29287, May 2, 1980]

§ 535.429 Exportation of technical data prohibited.

(a) The prohibition in § 535.207(a)(1) includes transfers of information, in eye-readable or machine-readable form, intended for use, directly or indirectly, in the design, production, manufacture, reconstruction, servicing, operation or use of any product.

(b) The prohibition on the exportation of technical data extends not only to unpublished technical information that is not available to the public, but also to published technical data such as operating, repair or service manuals for automotive or industrial equipment that are available through commercial sources such as book distributors.

[45 FR 29288, May 2, 1980]

§ 535.430 U.S. components of foreign-made goods.

The prohibitions in § 535.207(a)(1) apply to the sale, supply or other transfer after the effective date of § 535.207 of items, commodities or products for incorporation in foreign-manufactured goods where the person subject to the jurisdiction of the United States has reasonable cause to believe that those goods are intended for export to Iran.

[45 FR 29288, May 2, 1980]

§ 535.431 Goods in transit.

Shipments of Iranian origin merchandise covered by a bill of lading dated on or before April 17, 1980 are not within the prohibition in § 535.204.

[45 FR 29288, May 2, 1980]

§ 535.432 Provision of travel-related services.

Transactions prohibited by § 535.209(a) include all transactions by airlines, shipping lines, travel agents, ticket agents and similar persons subject to the jurisdiction of the United States in connection with arranging travel to or within Iran by U.S. citizens or U.S. permanent resident aliens, unless such travel is authorized or licensed under the provisions of this part. Such prohibited transactions include, but are not limited to, arranging through transportation to Iran; selling passages aboard a foreign carrier providing service to Iran, whether or not originating in the United States; chartering an aircraft or vessel; or arranging accommodations, ground transportation or travel activities within Iran.

[45 FR 37679, June 3, 1980]

Subpart E—Licenses, Authorizations and Statements of Licensing Policy

§ 535.502 Effect of license or authorization.

(a) No license or other authorization contained in this part or otherwise issued by or under the direction of the Secretary of the Treasury pursuant to section 203 of the International Emergency Economic Powers Act, shall be deemed to authorize or validate any transaction effected prior to the issuance thereof, unless such license or other authorization specifically so provides.

(b) No regulation, ruling, instruction, or license authorizes a transaction prohibited under this part unless the regulation, ruling, instruction, or license is issued by the Treasury Department and specifically refers to this part. No regulation, ruling, instruction or license referring to this part shall be deemed to authorize any transaction prohibited by any provision of Parts 500, 505, 515, 520 or 530 of this chapter unless the regulation, ruling, instruction or license specifically refers to such provision.

(c) Any regulation, ruling, instruction or license authorizing a transaction otherwise prohibited under this part has the effect of removing a prohibition or prohibitions in Subpart B

from the transaction, but only to the extent specifically stated by its terms. Unless the regulation, ruling, instruction or license otherwise specifies, such an authorization does not create any right, duty, obligation, claim, or interest in, or with respect to, any property which would not otherwise exist under ordinary principles of law.

[44 FR 66833, Nov. 21, 1979, as amended at 44 FR 75353, Dec. 19, 1979]

§ 535.503 Exclusion from licenses and authorizations.

The Secretary of the Treasury reserves the right to exclude any person from the operation of any license or from the privileges therein conferred or to restrict the applicability thereof with respect to particular persons, transactions or property or classes thereof. Such action shall be binding upon all persons receiving actual notice or constructive notice thereof.

[44 FR 66833, Nov. 21, 1979]

§ 535.504 Certain judicial proceedings with respect to property of Iran or Iranian entities.

(a) Subject to the limitations of paragraphs (b) and (c) of this section, judicial proceedings are authorized with respect to property in which on or since the effective date there has existed an interest of Iran or an Iranian entity.

(b) This section does not authorize or license:

(1) The entry of any judgment or of any decree or order of similar or analogous effect upon any judgment book, minute book, journal or otherwise, or the docketing of any judgment in any docket book, or the filing of any judgment roll or the taking of any other similar or analogous action.

(2) Any payment or delivery out of a blocked account based upon a judicial proceeding, nor does it authorize the enforcement or carrying out of any judgment or decree or order of similar or analogous effect with regard to any property in which Iran or an Iranian entity has an interest.

(c) A judicial proceeding is not authorized by this section if it is based on transactions which violated the prohibitions of this part.

(d) Property transferred into or held in the United States by Iran or an Iranian entity under a specific license which by its terms withdraws the authorization for pre-judgment attachment with respect to such property is excluded from the privileges of paragraph (a) of this section.

[44 FR 67617, Nov. 26, 1979, as amended at 44 FR 69650, Dec. 4, 1979]

§ 535.508 Payments to blocked accounts in domestic banks.

(a) Any payment or transfer of credit, including any payment or transfer by any U.S.-owned or controlled foreign firm or branch to a blocked account in a domestic bank in the name of Iran or any Iranian entity is hereby authorized: *Provided,* Such payment or transfer shall not be made from any blocked account if such payment or transfer represents, directly or indirectly, a transfer of the interest of Iran or an Iranian entity to any other country or person.

(b) This section does not authorize:

(1) Any payment or transfer to any blocked account held in a name other than that of Iran or the Iranian entity who is the ultimate beneficiary of such payment or transfer; or

(2) Any foreign exchange transaction including, but not by way of limitation, any transfer of credit, or payment of an obligation, expressed in terms of the currency of any foreign country.

(c) This section does not authorize any payment or transfer of credit comprising an integral part of a transaction which cannot be effected without the subsequent issuance of a further license.

(d) This section does not authorize the crediting of the proceeds of the sale of securities held in a blocked account or a sub-account thereof, or the income derived from such securities

to a blocked account or sub-account under any name or designation which differs from the name or designation of the specific blocked account or sub-account in which such securities were held.

(e) This section does not authorize any payment or transfer from a blocked account in a domestic bank to a blocked account held under any name or designation which differs from the name or designation of the specified blocked account or sub-account from which the payment or transfer is made.

(f) The authorization in paragraph (a) of this section is subject to the condition that a notification from the domestic bank receiving an authorized payment or transfer is furnished by the transferor to the Office of Foreign Assets Control confirming that the payment or transfer has been deposited in a blocked account under the regulations in this part and providing the name and address of Iran or the Iranian entity in whose name the account is held.

[44 FR 66590, Nov. 20, 1979]

§ 535.528 Certain transactions with respect to Iranian patents, trademarks and copyrights authorized.

(a) The following transactions by any person subject to the jurisdiction of the United States are authorized:

(1) The filing and prosecution of any application for an Iranian patent, trademark or copyright, or for the renewal thereof;

(2) The receipt of any Iranian patent, trademark or copyright;

(3) The filing and prosecution of opposition or infringement proceedings with respect to any Iranian patent, trademark, or copyright, and the prosecution of a defense to any such proceedings;

(4) The payment of fees currently due to the government of Iran, either directly or through an attorney or representative, in connection with any of the transactions

authorized by paragraphs (a)(1), (2), and (3) of this section or for the maintenance of any Iranian patent, trademark or copyright; and

(5) The payment of reasonable and customary fees currently due to attorneys or representatives in Iran incurred in connection with any of the transactions authorized by paragraphs (a)(1), (2), (3) or (4) of this section.

(b) Payments effected pursuant to the terms of paragraph (a)(4) and (5) of this section may not be made from any blocked account.

(c) As used in this section the term "Iranian patent, trademark, or copyright" shall mean any patent, petty patent, design patent, trademark or copyright issued by Iran.

[45 FR 29288, May 2, 1980]

§ 535.531 Payment of certain checks and drafts.

(a) A bank subject to the jurisdiction of the United States is hereby authorized to make payments from blocked accounts with such banking institution of checks and drafts drawn or issued prior to the effective date, *Provided,* That:

(1) The amount involved in any one payment, acceptance, or debit does not exceed $3,000; or

(2) The check or draft was within the United States in process of collection by a domestic bank on or prior to the effective date and does not exceed $50,000.

(3) The authorization contained in this paragraph shall expire at the close of business on January 14, 1980.

(b) A bank subject to the jurisdiction of the United States as its own obligation may make payment to a person subject to the jurisdiction of the United States who is the beneficiary of any letter of credit issued or confirmed by it, or on a draft accepted by it, prior to the effective date, where the letter of credit was issued or confirmed on behalf of Iran or an Iranian entity, *Provided,* That:

(1) Notwithstanding the provisions of § 535.902, no blocked account may at any time be debited in connection with such a payment.

(2) Such a payment shall give the bank making payment no special priority or other right to blocked accounts it holds in the event that such blocked accounts are vested or otherwise lawfully used in connection with a settlement of claims.

(3) Nothing in this paragraph prevents payment being made to the beneficiary of any draft or letter of credit or to any banking institution pursuant to § 535.904.

(c) The Office will consider on a case-by-case basis, without any commitment on its part to authorize any transaction or class of transactions, applications for specific licenses to make payments from blocked accounts of documentary drafts drawn under irrevocable letters of credit issued or confirmed by a domestic bank prior to the effective date, in favor of any person subject to the jurisdiction of the United States. Any bank or payee submitting such an application should include data on all such letters of credit in which it is involved. Applications should be submitted not later than January 10, 1980.

(d) Paragraphs (a) and (b) do not authorize any payment to Iran or an Iranian entity except payments into a blocked account in a domestic bank unless Iran or the Iranian entity is otherwise licensed to receive such payment.

[44 FR 75352, Dec. 19, 1979]

§ 535.532 Completion of certain securities transactions.

(a) Banking institutions within the United States are hereby authorized to complete, on or before November 21, 1979, purchases and sales made prior to the effective date of securities purchased or sold for the account of Iran or an Iranian entity provided the following terms and conditions are complied with, respectively.

(1) The proceeds of such sale are credited to a blocked account in a banking institution in the name of the person for whose account the sale was made; and

(2) The securities so purchased are held in a blocked account in a banking institution in the name of the person for whose account the purchase was made.

(b) This section does not authorize the crediting of the proceeds of the sale of securities held in a blocked account or a sub-account thereof, to a blocked account or sub-account under any name or designation which differs from the name or designation of the specific blocked account or sub-account in which such securities were held.

§ 535.550 Publications, films, etc. from Iran.

(a) Specific licenses are issued as appropriate for importations of publications, films, posters, phonograph records, photographs, microfilms, microfiche and tapes originating in Iran. All payments due the suppliers will be required to be made into accounts in domestic banks subject to the provisions of § 535.201 or § 535.206(a)(4). Such an account shall be established in the name of the seller and the licensee shall report such information concerning the importation and the account established in the name of the seller as the Office of Foreign Assets Control may require as a condition of the license.

(b) Such importations of publications, films, etc. are also licensed as appropriate when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importer and that there is not and has not been any direct or indirect financial or commercial benefit to an Iranian entity or any person in Iran from the importations.

[45 FR 29288, May 2, 1980]

§ 535.562 News material.

(a) *Imports by newsgathering agencies.* The purchase and importation of Iranian origin newspapers, magazines, photographs, films, tapes, and other news material or copies thereof by newsgathering agencies in the United States are authorized,

without restriction as to method of payment, provided such materials are intended for use in news publication or news broadcast dissemination.

(b) *Newsgathering activities in Iran by journalists and news correspondents.* The following transactions by a journalist or other person who is regularly employed by a newsgathering or transmitting organization who travels to Iran or is within Iran for the purposes of gathering or transmitting news, filming news or making documentary films, or similar activities are authorized:

(1) Payment of expenses for travel to, and maintenance within, Iran for the purposes of gathering and transmitting news to the United States; and

(2) The acquisition in Iran for transmission to and importation into the United States of newspapers, magazines, photographs, films, tapes, and other news material or copies thereof, necessary for the journalistic assignments.

(3) Within 5 days after engaging in the initial transaction with respect to a trip to or stay within Iran covered by this paragraph, the person engaging in the transaction, or the organization by which such person is employed, shall notify the Office of Foreign Assets Control. The notification shall include the name of the person upon whose behalf the general license is being used. Within 5 days after his departure from Iran, any person utilizing the general license shall send a second notification to the Office of Foreign Assets Control that he has departed Iran.

(c) *Accompanied baggage of journalists and news correspondents.* All transactions incident to the importation into the United States of accompanied baggage of a journalist or other person referred to in paragraph (b) of this section are authorized, provided that such baggage does not contain goods in commercial quantities.

[45 FR 26940, Apr. 21, 1980, as amended at 45 FR 29288, May 2, 1980]

§ 535.563 Family remittances to Iran.

(a) Remittances to any close relative of the remitter or of the remitter's spouse, who is a citizen of Iran and who is a resident of and within Iran, are authorized provided they do not involve any debit to a blocked account and are for the support of the payee and members of his household.

(b) The term "close relative" used with respect to any person means spouse, child, grandchild, parent, grandparent, uncle, aunt, brother, sister, nephew, niece, or spouse, widow, widower of any of the foregoing.

(c) The term "member of a household" used with respect to any person means a close relative sharing a common dwelling with such person.

(d) Remittances authorized by this section are limited to $1,000 per month to any one payee or to any one household.

(e) Any remittance exceeding the amount specified in paragraph (d) of this section would require a specific license.

[45 FR 26941, Apr. 21, 1980, as amended at 45 FR 29288, May 2, 1980]

§ 535.566 Unblocking of foreign currency deposits held by U.S.-owned or controlled foreign firms.

Deposits held abroad in currencies other than U.S. dollars by branches and subsidiaries of persons subject to the jurisdiction of the United States are unblocked, provided however that conversions of blocked dollar deposits into foreign currencies are not authorized.

[44 FR 66833, Nov. 21, 1979]

§ 535.567 Payment under advised letters of credit.

(a) Specific licenses may be issued for presentation, acceptance, or payment of documentary drafts under a letter of credit opened by an Iranian entity and advised by a domestic bank or an Iranian bank subject to the jurisdiction of the United States, *Provided,* That:

(1) The letter of credit was advised prior to the effective date;

(2) the property which is the subject of the payment under the letter of credit was not in the possession or control of the exporter on or after the effective date;

(3) the Beneficiary is a person subject to the jurisdiction of the United States.

(b) As a general matter licenses will not be issued if the amount to be paid to a single payee exceeds $500,000, or if hardship cannot be shown.

[44 FR 75354, Dec. 19, 1979]

§ 535.568 Certain standby letters of credit and performance bonds.

(a) Notwithstanding any other provision of law, payment into a blocked account in a domestic bank by an issuing or confirming bank under a standby letter of credit in favor of an Iranian entity is prohibited by § 535.201 and not authorized, notwithstanding the provisions of § 535.508, if either (1) a specific license has been issued pursuant to the provisions of paragraph; (b) hereof or (2) eight business days have not expired after notice to the account party pursuant to paragraph (b) hereof.

(b) Whenever an issuing or confirming bank shall receive such demand for payment under a standby letter of credit, it shall promptly notify the person for whose account the credit was opened. Such person may then apply within five business days for a specific license authorizing the account party to establish a blocked account on its books in the name of the Iranian entity in the amount payable under the credit, in lieu of payment by the issuing or confirming bank into a blocked account and reimbursement therefor by the account party.

(c) If necessary to assure the availability of the funds blocked, the Secretary may at any time require the payment of the amounts due under any letter of credit described in paragraph (a) into a blocked account in a domestic bank or the supplying of any form of security deemed necessary.

(d) Nothing in this section precludes any person for whose account a standby letter of credit was opened or any other person from at any time contesting the legality of the demand from the Iranian entity or from raising any other legal defense to payment under the standby letter of credit.

(e) This section does not affect the obligation of the various parties to the instruments covered by this section if the instruments and payments thereunder are subsequently unblocked.

(f) For the purposes of this section, the term "standby letter of credit" shall mean a letter of credit securing performance of, or repayment of, any advance payments of deposits, under a contract with Iran or an Iranian entity, or any similar obligation in the nature of a performance bond.

(g) The regulations do not authorize any person subject to the jurisdiction of the United States to reimburse a non-U.S. bank for payment to Iran or an Iranian entity under a standby letter of credit, except by payment into a blocked account in accordance with § 535.508 or paragraph (b) of this section.

(h) A person receiving a specific license under paragraph (b) of this section shall certify to the Office of Foreign Assets Control within five business days after receipt of that license that it has established the blocked account on its books as provided in that paragraph.

(i) The extension or renewal of a standby letter of credit is authorized.

[44 FR 75354, Dec. 19, 1979, as amended at 45 FR 1877, Jan. 9, 1980]

§ 535.569 Licensed letter of credit transactions; forwarding of documents.

When payment of a letter of credit issued, advised, or confirmed by a bank subject to the jurisdiction of the United States is authorized by either general or specific license, the forwarding of the letter of credit documents to the account party is authorized.

[45 FR 1877, Jan. 9, 1980]

§ 535.572 Authorization of exports of certain types of goods to Iran.

All transactions not inconsistent with § 535.419 and ordinarily incident to the export to Iran of the following types of goods are hereby authorized:

(a) Medicines and supplies intended strictly for medical purposes.

(b) Food.

(c) Donations of clothing intended to be used to relieve human suffering.

[45 FR 24434, Apr. 9, 1980]

§ 535.574 Service contracts in support of telecommunications in Iran.

Specific licenses will be considered for transactions incident to telecommunications with Iran.

[45 FR 24434, Apr. 9, 1980]

§ 535.575 Exports of newspapers, magazines, films, etc. to Iran.

All transactions not inconsistent with § 535.419 and ordinarily incident to the export to Iran of newspapers, magazines, journals, newsletters, books, films, phonograph records, photographs, microfilms, microfiche, tapes or similar materials are authorized, except such materials which are principally devoted to the dissemination of technical data.

[45 FR 29288, May 2, 1980]

§ 535.576 Payment of non-dollar letters of credit to Iran.

Not withstanding the prohibitions of §§ 535.201 and 535.206(a)(4), payment of existing non-dollar letters of credit in favor of Iranian entities or any person in Iran by any foreign branch or subsidiary of a U.S. firm is authorized, provided that the credit was opened prior to the respective effective date.

[45 FR 29288, May 2, 1980]

§ 535.577 Household goods and personal effects.

All transactions incident to the exportation to Iran of household goods and personal effects of an Iranian individual departing the United States are authorized, provided that no goods in commercial quantities may be exported under this general license.

[45 FR 29288, May 2, 1980]

§ 535.578 Passengers' baggage and personal effects.

(a) All transactions incident to the importation into the United States of baggage, household goods and personal effects of the following persons are authorized, provided that such importation does not include goods in commercial quantities:

(1) United States citizens and U.S. resident aliens who departed Iran on or before April 24, 1980;

(2) Third country nationals; and

(3) Dual nationals of the United States and Iran.

(b) All transactions incident to the importation into the United States of baggage, household goods and personal effects of an Iranian national who enters the United States on a visa issued by the Department of State are authorized, provided that such importation does not include goods in commercial quantities.

(c) All transactions incident to the importation into the United States of baggage and personal effects of a crew member of vessels or aircraft in the United States on temporary sojourn are authorized, provided that such importation does not include goods in commercial quantities and any such articles are intended for export from the United States with the crew member upon his departure.

[45 FR 29288, May 2, 1980]

Subpart F—Reports

§ 535.601 Records.

Every person engaging in any transaction subject to the provisions of this part shall keep a full and accurate record of each such transaction engaged in by him, regardless of whether such transaction is effected pursuant to license or otherwise, and such record shall be available for examination for at least two years after the date of such transaction.

[44 FR 75354, Dec. 19, 1979]

§ 535.602 Reports to be furnished on demand.

Every person is required to furnish under oath, in the form of reports or otherwise, from time to time and at any time as may be required by the Secretary of the Treasury or any person acting under his direction or authorization complete information relative to any transaction subject to the provisions of this part or relative to any property in which any foreign Country or any national thereof has any interest of any nature whatsoever, direct or indirect. The Secretary of the Treasury or any person acting under his direction may require that such reports include the production of any books of account, contracts, letters or other papers, connected with any such transaction or property, in the custody or control of the persons required to make such reports. Reports with respect to transactions may be required either before or after such transactions are completed. The Secretary of the Treasury may, through any person or agency, investigate any such transaction or property or any violation of the provisions of this part regardless of whether any report has been required or filed in connection therewith.

[44 FR 75354, Dec. 19, 1979]

§ 535.603 Report of proposed subsidiary transaction with Iran.

(a) A U.S. company required by § 535.206(b) or § 535.207(b) to submit a report to the Office of Foreign Assets Control regarding a proposed transaction with Iran by a subsidiary shall submit a letter containing the following information.

(1) Name of the foreign subsidiary involved.

(2) Location.

(3) Description of the merchandise.

(4) Value.

(5) Ultimate Iranian consignee.

(6) Identity of any intermediary firm(s).

(7) End-use.

(8) Payment terms.

(b) The report shall be addressed as follows: Ms. Susan Swinehart, Chief of Licensing, Office of Foreign Assets Control, Treasury Department, Washington, D.C. 20220. Attn: Section 535.603 Report—EXPEDITE.

(c) The report must be submitted in sufficient time to reach the Office of Foreign Assets Control 10 days before any subsidiary enters into any transaction covered by § 535.206 or § 535.207.

[45 FR 29289, May 2, 1980]

§ 535.615 Reports on Form TFR-615.

(a) *Requirement for report.* Reports on Form TFR-615 are hereby required to be filed on or before May 15, 1980, in the manner prescribed herein, with respect to all property subject to the jurisdiction of the United States or in the possession or control of any person subject to the jurisdiction of the United States at any time between the effective date and March 31, 1980, in which Iran or an Iranian entity has or has had any interest.

(1) *Who must report.* Reports on Form TFR-615 must be filed by each of the following:

(i) Any person subject to the jurisdiction of the United States or his successor, who on the effective date or any subsequent date up to and including March 31, 1980, had in his custody, possession or control, directly or indirectly, in trust or otherwise, property in which there was any direct or indirect

interest of Iran or any Iranian entity, whether or not the property continued to be held by that person on March 31, 1980; and

(ii) Any business or non-business entity in the United States in which Iran or an Iranian entity held any financial interest on the effective date or on any subsequent date.

(2) *Property not required to be reported.* A report on Form TFR-615 is not required with respect to:

(i) Property of a private Iranian national; and

(ii) Patents, copyrights, trademarks and inventions; *Provided, however,* That a report is required with respect to any royalties due and unpaid in connection with such property.

(b) *Filing Form TFR-615.* Reports on Form TFR-615 shall be prepared in triplicate. On or before May 15, 1980, two copies shall be sent in a set to Unit 615, Office of Foreign Assets Control, Department of the Treasury, Washington, D.C. 20220. The third copy must be retained with the reporter's records.

(c) *Certification.* Every report on Form TFR-615 shall contain the certification required in Part F of the Form. Failure to complete the certification shall render the report ineffective, and the submission of such a report shall not constitute compliance with this section.

(d) *Confidentiality of reports.* Reports on Form TFR-615 are regarded as privileged and confidential.

[45 FR 24408, Apr. 9, 1980]

§ 535.616 Reports on Form TFR-616.

(a) *Requirement for reports.* Reports on Form TFR-616 are hereby required to be filed on or before May 15, 1980, in the manner prescribed herein, with respect to claims for losses due to expropriation, nationalization, or other taking of property or businesses in Iran, including any special measures such as Iranian exchange controls directed against such property or businesses; claims for debt defaults, for damages for breach of contract or similar damages; and personal claims for salaries or for injury to person or property.

(b) *Who must report.* Reports on Form TFR-616 must be filed by every person subject to the jurisdiction of the United States which had a claim against Iran or an Iranian entity which arose before April 15, 1980. No report is to be submitted by a U.S. branch of a foreign firm not owned or ccntrolled by a person subject to the jurisdiction of the United States or by a nonresident alien.

(c) *Filing Form TFR-616.* Reports on Form TFR-616 shall be prepared in triplicate. On or before May 15, 1980, two copies shall be sent in a set to Unit 616, Office of Foreign Assets Control, Department of the Treasury, Washington, D.C. 20220. The third copy must be retained with the reporter's record.

(d) *Certification.* Every report on Form TFR-616 shall contain the certification required on Part E of the Form. Failure to complete the certification shall render the report ineffective, and the submission of such a report shall not constitute compliance with this section.

(e) *Confidentiality of reports.* Reports on Form TFR-616 are regarded as privileged and confidential.

[45 FR 24408, Apr. 9, 1980]

Subpart G—Penalties

§ 535.701 Penalties

(a) Attention is directed to section 206 of the International Emergency Economic Powers Act which provides in part:

(a) A civil penalty of not to exceed $10,000 may be imposed on any person who violates any license, order, or regulation issued under this title.

(b) Whoever willfully violates any license, order, or regulation issued under this title shall, upon conviction be fined not more than $50,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment or both.

This section of the International Emergency Economic Powers Act is applicable to violations of any provision of this part and to violations of the provisions of any license, ruling, regulation, order, direction or instruction issued by or pursuant to the direction or authorization of the Secretary of the Treasury pursuant to this part or otherwise under the International Emergency Economic Powers Act.

(b) Attention is also directed to 18 U.S.C. 1001 which provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representation or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not *more than five years, or both.*

Subpart H—Procedures

SOURCE: 44 FR 66833, Nov. 21, 1979, unless otherwise noted.

§ 535.801 Licensing.

(a) *General licenses.* General licenses have been issued authorizing under appropriate terms and conditions many types of transactions which are subject to the prohibitions contained in Subpart B of this part. All such licenses are set forth in Subpart E of this part. It is the policy of the Office of Foreign Assets Control not to grant applications for specific licenses authorizing transactions to which the provisions of an outstanding general license are applicable. Persons availing themselves of certain general licenses are required to file reports and statements in accordance with the instructions specified in the licenses.

(b) *Specific licenses*—(1) General course of procedure. Transactions subject to the prohibitions contained in Subpart B

of this part which are not authorized by general license may be effected only under specific license. The specific licensing activities of the Office of Foreign Assets Control are performed by its Washington Office and by the Federal Reserve Bank of New York. When an unusual problem is presented, the proposed action is cleared with the Director of the Office of Foreign Assets Control or such person as he may designate.

(2) *Applications for specific licenses.* Applications for specific licenses to engage in any transaction prohibited by or pursuant to this part are to be filed in duplicate on Form TFAC-27 with the Federal Reserve Bank of New York. Any person having an interest in a transaction or proposed transaction may file an application for a license authorizing the effecting of such transaction, and there is no requirement that any other person having an interest in such transaction shall or should join in making or filing such application.

(3) *Information to be supplied.* Applicant must supply all information specified by the respective forms and instructions. Such documents as may be relevant shall be attached to each application as a part of such application except that documents previously filed with the Office of Foreign Assets Control may, where appropriate, be incorporated by reference. Applicants may be required to furnish such further information as is deemed necessary to a proper determination by the Office of Foreign Assets Control. If an applicant or other party in interest desires to present additional information or discuss or argue the application, he may do so at any time before or after decision. Arrangements for oral presentation should be made with the Office of Foreign Assets Control.

(4) *Effect of denial.* The denial of a license does not preclude the reopening of an application or the filing of a further application. The applicant or any other party in interest may at any time request explanation of the reasons for a denial by correspondence or personal interview.

(5) *Reports under specific licenses.* As a condition upon the issuance of any license, the licensee may be required to file reports with respect to the transaction covered by the license, in

such form and at such times and places as may be prescribed in the license or otherwise.

(6) *Issuance of license.* Licenses will be issued by the Office of Foreign Assets Control acting on behalf of the Secretary of the Treasury or by the Federal Reserve Bank of New York, acting in accordance with such regulations, rulings and instructions as the Secretary of the Treasury or the Office of Foreign Assets Control may from time to time prescribe, in such cases or classes of cases as the Secretary of the Treasury or the Office of Foreign Assets Control may determine, or licenses may be issued by the Secretary of the Treasury acting directly or through any person, agency, or instrumentality designated by him.

§ 535.802 Unblocking.

Any interested person desiring the unblocking of accounts or other property on the ground that neither Iran nor any Iranian entity has an interest in the property may file such an application. Such application shall be filed in the manner provided in § 535.801(b) and shall contain full information in support of the administrative action requested.

The applicant is entitled to be heard on the application. If the applicant desires a hearing, arrangements should be made with the Office of Foreign Assets Control.

§ 535.803 Decision.

The Office of Foreign Assets Control or the Federal Reserve Bank of New York will advise each applicant of the decision respecting applications filed by him. The decision of the Office of Foreign Assets Control acting on behalf of the Secretary of the Treasury with respect to an application shall constitute final agency action.

§ 535.804 Records and reporting.

Records are required to be kept by every person engaging in any transaction subject to the provisions of this part.

Reports may be required from any person with respect to any transaction subject to the provisions of this chapter or relative to any property in which any foreign country or any national thereof has any interest.

§ 535.805 Amendment, modification, or revocation.

The provisions of this part and any rulings, licenses, authorizations, instructions, orders, or forms issued thereunder may be amended, modified, or revoked at any time.

§ 535.806 Rule making.

(a) In general, rule making by the Office of Foreign Assets Control involves foreign affairs functions of the United States to which the provisions of the Administrative Procedure Act, 5 U.S.C. 553, requiring notice of proposed rule making, the opportunity for public participation and a delay in effective date are inapplicable. However, the Office of Foreign Assets Control may consult with interested groups or persons in connection with the issuance of rules or the establishment of licensing policies.

(b) Any interested person may recommend in writing to the Director of the Office of Foreign Assets Control the issuance, amendment or the repeal of any rule.

[44 FR 75353, Dec. 19, 1979]

Subpart I—Miscellaneous Provisions

§ 535.901 Dollar accounts at banks abroad.

Any domestic bank is hereby authorized to effect withdrawals or other transfers from any account held in the name of a non-Iranian bank located in a foreign country, provided such non-Iranian foreign bank is not a person subject to the jurisdiction of the United States.

§ 535.902 Set-offs by U.S. owned or controlled firms abroad.

Branches and subsidiaries in foreign countries of persons subject to the jurisdiction of the United States are licensed to set-off their claims against Iran or Iranian entities by debit to blocked accounts held by them for Iran or Iranian entities.

[44 FR 65988, Nov. 16, 1979]

§ 535.904 Payment by Iranian entities of obligations to persons within the United States.

The transfer of funds after the effective date by, through or to any U.S. banking institution or other person within the United States solely for purposes of payment of obligations by Iranian entities owed to persons within the United States is authorized: *Provided,* That there is no debit to a blocked account. Property is not blocked by virtue of being transferred or received pursuant to this section.

[44 FR 66591, Nov. 20, 1979]

44 Fed. Reg. 65,956 (1979)
(to be codified in 31 C.F.R. §535.201)

§535.201 Transactions involving Iran; effective date.

(a) No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after the effective date Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized;

(b) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraph (a) of this section is hereby prohibited;

(c) The term effective date means with respect to Iran, 8:10 a.m., eastern standard time, November 14, 1979.

46 Fed. Reg. 14,334 (1981), *as amended*,
46 Fed. Reg. 26,477 (1981),
46 Fed. Reg. 30,341 (1981),
46 Fed. Reg. 31,630 (1981),
(to be codified in 31 C.F.R. §535.213)

§535.213 Direction involving property held by offices of banks in the United States in which Iran or an Iranian entity has an interest.

(a) Any branch or office of a bank, which branch or office is located within the United States and is, on the effective date of this section, either (1) in possession of funds or securities legally or beneficially owned by the Government of Iran or its agencies, instrumentalities or controlled entities, or (2) carrying on its books deposits standing to the credit of or beneficially owned by such government or its agencies, instrumentalities or controlled entities, is licensed, authorized, directed and compelled to transfer such funds, securities and deposits, held on January 19, 1981, including interest from November 14, 1979, at commercially reasonable rates, to the Federal Reserve Bank of New York, as fiscal agent of the U.S., to be held or transferred as directed by the Secretary of the Treasury.

(b) Transfers of funds, securities or deposits under paragraph (a) of this section shall be in accordance with the provisions of §535.221 of this part, and such funds, securities or deposits, plus interest at commercially reasonable rates from November 14, 1979, to the transfer date, shall be received by the Federal Reserve Bank of New York on or before noon, E.D.T., June 19, 1981. For periods for which rates are to be determined in the future, whether by agreement between Iran and the bank or otherwise (see §535.440), interest for such periods shall be transferred to the Federal Reserve Bank of New York promptly upon such determination. Persons in possession or control of property required to be transferred by this section shall take all actions they believe necessary to effect the required transfers.

(c) Any funds, securities or deposits subject to a valid attachment, injunction or other like proceeding or process not affected by §535.218 need not be transferred as otherwise required by this section.

(d) The transfers of securities required by this section shall be made notwithstanding §535.202.

(e) For any property described in paragraph (a) of this section, the transfer time in paragraph (b) is extended to a date to be determined subsequently by the Department of the Treasury.

46 Fed. Reg. 14,334 (1981), *as amended*,
46 Fed. Reg. 26,477 (1981),
46 Fed. Reg. 30,341 (1981).
46 Fed. Reg. 31,630 (1981),
(to be codified in 31 C.F.R. §535.214)

§535.214 Direction involving other financial assets in which Iran or an Iranian entity has an interest held by any person subject to the jurisdiction of the United States.

(a) Any person subject to the jursidiction of the United States which is not a banking institution and is on January 19, 1981, in possession or control of funds or securities of Iran or its agencies, instrumentalities or controlled entities is licensed, authorized, directed and compelled to transfer such funds or securities to the Federal Reserve Bank of New York, as fiscal agent of the U.S. to be held or transferred as directed by the Secretary of the Treasury. However, such funds and securities need not be transferred until any disputes (not relating to any attachment, injunction or similar order) as to the entitlement of Iran and its entities to them are resolved.

(b) Transfers of funds and securities under paragraph (a) of this section shall be in accordance with the provisions of §535.221 of this part, and such funds and securities shall be received by the Federal Reserve Bank of New York on or before noon, E.D.T., June 19, 1981. Persons in possession or control of property required to be transferred by this section shall take all actions they believe necessary to effect the required transfers.

(c) Any funds, securities or deposits subject to a valid attachment, injunction or other like proceeding or process not affected by §535.218 need not be transferred as otherwise required by this section.

(d) The transfers of securities required by this section shall be made notwithstanding §535.202.

(e) For any property described in paragraph (a) of this section, the transfer time in paragraph (b) is extended to a date to be subsequently determined by the Department of the Treasury.

46 Fed. Reg. 14,334 (1981), *as amended*,
46 Fed. Reg. 26,477 (1981),
46. Fed. Reg. 31,630 (1981),
(to be codified in 31 C.F.R. §535.215)

§535.215 Direction involving other properties in which Iran or an Iranian entity has an interest held by any person subject to the jurisdiction to the United States.

(a) All persons subject to the jurisdiction of the United States in possession or control of properties, as defined in §535.333 of this part, not including funds and securities owned by Iran or its agencies, instrumentalities or controlled entities are licensed, authorized, directed and compelled to transfer such properties held on January 19, 1981 as directed after that date by the Government of Iran, acting through its authorized agent. Except where specifically stated, this license, authorization and direction does not relieve persons subject to the jurisdiction of the United States from existing legal requirements other than those based upon the International Emergency Economic Powers Act.

(b) Any properties subject to a valid attachment, injunction or other like proceeding or process not affected by §535.218 need not be transferred as otherwise required by this section.

(c) The United States Government will not seek to impose civil or criminal sanctions on any party for failure to transfer before a date to be determined by the Department of the Treasury any property described in paragraph (a) of this section that is the subject of an attachment, injunction, or other like proceedings or process on June 19, 1981.

46 Fed. Reg. 14,335 (1981),
(to be codified in 31 C.F.R. §535.221)

§535.221 Compliance with directive provisions.

(a) Compliance with the directive provisions of §§535.213 and 535.214 requires that persons affected by these sections shall implement the directives as soon as reasonably practicable.

(b) Until the Secretary of the Treasury determines that the authority of the United States to order these transfers has been the subject of a definitive legal ruling, the United States Government will not seek to impose civil or criminal sanctions on any party who does not make the transfers required by §§535.213, 535.214 and 535.215 and Executive Orders 12279-81 of January 19, 1981.

(c) Transfers of deposits or funds required by §§535.213 and 535.214 of this part shall be effected by means of wire transfer to the Federal Reserve Bank of New York for credit to the following account: Federal Reserve Bank of New York, as fiscal agent of the United States, Special Deposit Account.

(d) Securities to be transferred as required by §§535.213 and 535.214 of this part must be delivered to the Federal Reserve Bank of New York in fully transferable form, accompanied by all necessary transfer documentation, *e.g.*, stock or bond powers, powers of attorney, and also accompanied by instructions to deposit such securities to the following account: Federal Reserve Bank of New York, as fiscal agent of the United States, Special Custody Account.

(1) Securities which are in book-entry form shall be transferred by wire transfer to the Federal Reserve Bank of New York for credit to the account named in paragraph (d) of this section.

(2) Definitive securities which are in bearer or registered form shall be hand delivered or forwarded by registered mail, insured, to the Federal Reserve Bank of New York, Safekeeping Department.

(e) If a security in which Iran or an Iranian entity has an interest is evidenced by a depositary receipt or other evidence of a security, the legal owner of such security shall arrange to have it placed in registered form in the name of Iran or the Iranian entity having an interest in such security, as appropriate, and transferred pursuant to paragraph (d)(2) of this section.

(f) Securities in which Iran or an Iranian entity has an interest that are held in the name of a nominee must be re-registered in the name of Iran or the Iranian entity having an interest in such security, as appropriate, and transferred pursuant to paragraph (d)(2) of this section.

(g) Any person delivering a security or securities to the Federal Reserve Bank of New York under paragraph (d) shall provide the Bank at least two business days prior written notice of such delivery, specifically identifying the sending person, the face or par amount and type of security, and whether the security is in bearer, registered or book entry form.

46 Fed. Reg. 30,341 (1981)
(to be codifed in 31 C.F.R. §535.221)

§535.221 Compliance with directive provisions.

(a) Transfers of deposits or funds required by §§535.213 and 535.214 of this part shall be effected by means of wire transfer to the Federal Reserve Bank of New York for credit to the following accounts: with respect to transfers required by §535.213, to the Federal Reserve Bank of New York, as fiscal agent of the United States, Special Deposit Account A, and with respect to transfers required by §535.214, to the Federal Reserve Bank of New York, as fiscal agent of the United States, Special Deposit Account B.

(b) Securities to be transferred as required by §§535.213 and 535.214 of this part that are not presently registered in the name of Iran or an Iranian entity shall be delivered to the Federal Reserve Bank of New York in fully transferable form (bearer or endorsed in blank), accompanied by all necessary transfer documentation, *e.g.*, stock or bond powers or powers of attorney. All securities transferred, including those presently registered in the name of Iran or an Iranian entity, shall be accompanied by instructions to deposit such securities to the following accounts: with respect to transfers required by §535.213, to the Federal Reserve Bank of New York, as fiscal agent of the United States, Special Custody Account A, and with respect to transfers required by §535.214, to the Federal Reserve Bank of New York, as fiscal agent of the United States, Special Custody Account B.

(1) Securities which are in book-entry form shall be transferred by wire transfer to the Federal Reserve Bank of New York to the appropriate account named in this paragraph.

(2) Definitive securities which are in bearer or registered form shall be hand delivered or forwarded by registered mail, insured, to the Federal Reserve Bank of New York, Safekeeping Department, to the appropriate account named in this paragraph.

(c) If a security in which Iran or an Iranian entity has an interest is evidenced by a depositary receipt or other evidence of a security, the legal owner of such security shall arrange to have the security placed in fully transferable form (bearer or endorsed in blank) as provided in paragraph (b) of this section, and transferred pursuant to paragraph (b)(2) of this section.

(d) Any person delivering a security or securities to the Federal Reserve Bank of New York under paragraph (b) shall provide the Bank at least 2 business days prior written notice of such delivery, specifically identifying the sending person, the face or par amount and type of security, and whether the security is in bearer, registered or book-entry form.

46 Fed. Reg. 30,340 (1981)

Department of the Treasury
Office of Foreign Assets Control 31 CFR Part 535

Iranian Assets Control Regulations:
Transfer of Financial Assets to Federal Reserve Bank of New York

Agency: Office of Foreign Assets Control.

Action: Final rule.

Summary: The Office of Foreign Assets Control is amending the Iranian Assets Control Regulations. The purposes of the amendments are: (1) to direct banks and other persons holding Iranian financial assets to transfer them to the Federal Reserve Bank of New York on or before noon, E.D.T., June 19, 1981; (2) to revoke the policy of not seeking to impose criminal and civil sanctions on holders of Iranian property who do not comply with the transfer requirements of the Iranian Assets Control Regulations; (3) to provide additional guidance on the meaning of the term "commercially reasonable" rates of interest; (4) to make clear that no transfer requirement under §535.213 or §535.214 shall be deemed to authorize or compel any payment or transfer of any obligation under a standby letter of credit, performance bond, or similar obligation as to which a blocked account has been established pursuant to §535.568 or as to which payment is prohibited under an injunction obtained by the account party; and (5) to require that persons making the required transfers of financial assets of Iran to the Federal Reserve Bank of New York promptly report on those transfers to the Office of Foreign Assets Control.

The amendments are needed to facilitate the ongoing implementation of the Iran-U.S. agreements of January 19, 1981, providing for the release of the hostages detained in Iran and the transfer of Iranian property blocked by the United States. See further discussion under "Supplementary Information".

Effective Date: June 4, 1981.

46 Fed. Reg. 14337 (1981)

25. Part 535 is amended by the revocation and removal of sections 535.204, 535.206, 535.207, 535.209, 535.331, 535.332, 535.418, 535.419, 535.422, 535.423, 535.424, 535.425, 535.426, 535.427, 535.428, 535.429, 535.430, 535.431, 535.432, 535.550, 535.562, 535.563, 535.572, 535.574, 535.575, 535.577, 535.578, and 535.603.

§535.204 [Removed]

§535.206-207 [Removed]

§535.209 [Removed]

§535.331 [Removed]

§535.332 [Removed]

§535.418 [Removed]

§535.419 [Removed]

§535.422-432 [Removed]

§535.550 [Removed]

§535.562 [Removed]

§535.563 [Removed]

§535.572 [Removed]

§535.574 [Removed]

§535.575 [Removed]

§535.577 [Removed]

§535.578 [Removed]

§535.603 [Removed]

Dated: February 24, 1981

Dennis M. O'Connell, *Director.*

Approved: John P. Simpson, *Acting Assistant Secretary, Enforcement and Operations.*

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No. 80-2078

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DAMES & MOORE, A PARTNERSHIP, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

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DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

The Solicitor General, on behalf of the United States and the Secretary of the Treasury, urges the Court to grant the petition for a writ of certiorari before judgment to the United States Court of Appeals for the Ninth Circuit in this case.

The district court's decision upholds the authority of the President to revoke licenses for attachments of assets in which Iran has an interest, to order the transfer of these assets in compliance with the terms of the Agreement with Iran, and to suspend claims against Iran that may be presented to the Iran-United States Claims Tribunal. The district court's decision therefore is consistent with holdings of the Courts of Appeals for the First and District of Columbia Circuits, the only two courts of appeals to have ruled on these questions. Although the district court's decision in this case is correct and there is no

conflict among the circuits on the question presented in the petition, we request the court to review these questions under the extraordinary procedure of certiorari before judgment because of the absence of binding precedent in other circuits -- particularly the Second Circuit -- that similarly establishes the authority of the President to require the transfer of Iranian assets held by domestic banking institutions in those circuits by the July 19, 1981, deadline provided in the Agreement with Iran. A decision by this Court prior to July 19 will furnish controlling precedent for the orderly disposition of the more than 400 cases pending in the lower federal courts in the Second Circuit and elsewhere that involve claims against the Government of Iran and its instrumentalities and controlled entities.

1.a. On December 19, 1979, petitioner filed suit in the United States District Court for the Central District of California against the Government of Iran, the Atomic Energy Organization of Iran, and a number of Iranian banks that, petitioner asserts (Pet. 5), had been nationalized by the Government of Iran. Dames & Moore v. Atomic Energy Organization of Iran, et al., No. 79-04918 LEW (Px) (C.D. Cal.). Petitioner alleged that it was a party to a written contract with the Atomic Energy Organization of Iran (AEOI), under which it was to conduct certain site studies for a proposed nuclear power plant in Iran. 1/ The contract was terminated by AEOI on June 30, 1979, for the convenience of AEOI, as provided in the contract. In its complaint against the Iranian defendants, petitioner alleged that

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1/ Actually, the complaint states that the party to the contract was a wholly owned subsidiary of petitioner, Dames & Moore International, S. R. L., and that this entity had assigned its entire interest under the contract to petitioner. For convenience, we will regard petitioner as the party to the contract.

it was owed $3,436,694.30 for services performed under the contract prior to the date of termination.

The contract with AEOI provided that if any dispute arising thereunder could not be resolved by agreement between the parties, the dispute would be submitted to conciliation 2 / and, if neither party was satisfied with the results of conciliation, "the matter shall be decided finally by resort to the courts of Iran" (Pet. 7 n.2). In its complaint in the action against the Iranian defendants, petitioner alleged that it had sought a meeting with AEOI for purposes of final settlement of all matters relating to the contract but that AEOI "has continually postponed said meeting and obviously does not intend that it take place" (Complaint, ¶27).

b. In its suit against the Iranian defendants, petitioner sought to recover the $3,436,694.30 that was allegedly owing, plus interest, on breach of contract and related theories. The district court issued orders of attachments directed against property of the defendants, and property of certain bank defendants was thereby attached to secure any judgment that might be entered against them. 3 / On January 27, 1981, petitioner moved for summary judgment against AEOI and the Government of Iran (but not the Iranian banks). The motion was accompanied by affidavits attesting to the amount owing under the contract and with a request pursuant to Fed. R. Civ. P. 37(b)(2) to prohibit AEOI

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2 / Each party had the right to appoint one conciliator, with a third conciliator to be appointed by the Plan and Budget Organization of the Government of Iran. Pet. 7 n.2.

3 / Although we have not seen documents itemizing the attached assets, we have been informed by counsel for petitioner that some of the assets on which attachments were obtained are held by domestic banking institutions and are therefore assets that must be transferred by July 19, 1981.

and the Government of Iran from introducing any evidence in opposition to petitioner's motion for summary judgment as a sanction for AEOI's failure to comply with petitioner's discovery requests.

On February 18, 1981, the district court granted petitioner's motion for summary judgment against AEOI and the Government of Iran for the amount claimed under the contract, plus interest. AEOI and the Government of Iran filed a notice of appeal from this judgment on March 20, 1981. Petitioner attempted to execute on this judgment by obtaining writs of garnishment and execution in state court in the State of Washington, and a sheriff's sale of Iranian property was noticed in Washington to satisfy the judgment (Pet. 5-6; Pet. App. 15-18). 4 / However, by order of May 28, 1981, as amended by order of June 8, the district court stayed execution of the judgment pending the appeal of that judgment by AEOI and the Government of Iran (Pet. App. 106-107). On May 28, 1981, the district court also ordered that all pre-judgment attachments obtained in the suit against the Iranian defendants be vacated and that further proceedings against the bank defendants be stayed (id. at 107).

2. On April 28, 1981, petitioner filed the instant suit for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the Executive Orders and Treasury Department regulations implementing the Agreement with Iran in a way that would adversely affect its separate action against the Iranian defendants (Pet. App. 1-12). Those Executive Orders and

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4 / Petitioner did not obtain a pre-judgment attachment of assets of the Government of Iran or AEOI, the two defendants against whom judgments were entered.

regulations generally revoke licenses for attachments of Iranian property, prevent the acquisition of any interest in such property and order the transfer of the property as required by the Agreement and Executive Orders, and suspend claims that may be presented to the Iran-United States Claims Tribunal (Executive Orders 12277-12281, 12294 (Pet. App. 36-54); 31 C.F.R. 535.201 (1980); 31 C.F.R. 535.213 et seq., as amended (Pet. App. 55-86). Petitioner contended that these Executive Orders and regulations are unconstitutional to the extent that they affect its final judgment against the Government of Iran and AEOI, petitioner's execution on that judgment in the State of Washington, petitioner's pre-judgment attachments of assets of the Iranian bank defendants, and petitioner's ability to continue to litigate against the bank defendants, against whom judgment had not been entered (Pet. App. 7-11).

By order dated May 28, 1981, the district court denied petitioner's motion for a preliminary injunction and dismissed petitioner's complaint for failure to state a claim upon which relief could be granted (Pet. App. 106-107). By order dated June 8, 1981, the district court stated that its orders denying a preliminary injunction and dismissing the complaint were based on the arguments presented by the government in its motion to dismiss and its memorandum in support of that motion (Pet. App. 161). The government's motion to dismiss and the memorandum in support thereof, relied upon by the district court, are reproduced at Pet. App. 88-105.

On June 3, 1981, petitioner filed a notice of appeal from the order denying a preliminary injunction and dismissing the complaint (Pet. App. 163-164), and the appeal has been docketed in the court of appeals (id. at 162). On June 8, 1981, the

district court entered an injunction pending appeal preventing the federal government from requiring the transfer of Iranian property that is subject to any writ of attachment, garnish-ment, judgment, levy or lien issued by any court in favor of petitioner (Pet. App. 167-168). Petitioner now seeks certiorari before judgment to review the decision of the district court.

3. The decision of the district court in this case, which is based on the government's arguments in support of its motion to dismiss, is plainly correct. It is also consistent with the decisions of the First and District of Columbia Circuits, 5 / the only courts of appeals that have addressed the President's authority to revoke licenses for post-blocking order attachments of Iranian assets, to order the transfer of Iranian assets, and to provide for suspension of claims that may be referred to the Iran-United States Claims Tribunal. See Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir. May 22, 1981); American Int'l Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir. May 22, 1981) (opinion filed June 5, 1981). 6 / Decisions of the district courts -- including two others in the Ninth Circuit -- also have unanimously sustained the authority of the President to revoke licenses for post-blocking order attachments and to order the transfer of property that had been subject to such attachments. See Security Pacific National Bank, et al. v. Government and State of Iran, No. CV 79-

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5 / None of the losing parties in the First or District of Columbia cases has thus far sought review in this Court or announced its intention to do so.

6 / Copies of these opinions are attached as appendices to this memorandum.

4661-RJK (C.D. Cal. April 30, 1981). 7 / Blount Brothers Corp. v. Government of Iran, Civ. Action No. C79-14424 (W.D. Wash. May 7, 1981); Unidyne Corp. v. Islamic Republic of Iran, No. 80-1029-A (E.D. Va. Mar. 30, 1981). 8 / And, finally, the Ninth Circuit has denied a stay pending appeal in the Blount Brothers case of an order vacating an attachment, thereby allowing that attachment to lapse. 9 /

Ordinarily, in view of these consistent and plainly correct rulings of the lower courts sustaining the President's authority, 10 / we would not acquiesce in certiorari (particularly certiorari before judgment) in a case raising these same issues. The government sought to sustain the President's authority in the lower courts, as has been done thus far, and

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7 / An appeal has been taken by the claimant in one of these four consolidated cases, and the government has moved to intervene in the court of appeals and for summary affirmance.

8 / Copies of these district court opinions were furnished to the Court by petitioner in Electronic Data Systems, Iran v. The Social Security Organization of Iran, No. 80-2035, cert. denied (June 8, 1981).

9 / The Ninth Circuit cited the "broad executive powers" conferred by the International Economic Emergency Powers Act, 50 U.S.C. (Supp. III) 1701 et seq. The district court order vacating the attachment in Blount Brothers became effective on June 6, 1981, when the claimant did not seek further review in this Court.

10 / In its opinion of June 7, 1981, the district court in Electronic Data Systems, Iran v. The Social Security Organization of Iran, et al., No. CA3-79-218-F (N.D. Tex.), concluded that the President does not have authority to suspend claims that may be referred to arbitration. The district court conceded that there was "ample precedent" for the Executive to settle such claims when United States courts recognized a broad doctrine of immunity of foreign sovereigns from suit (op. 13), but concluded essentially that this power had been implicitly divested by passage of the Foreign Sovereign Immunities Act (op. 13-14, 20-24). That conclusion is in error. See note 14, infra. Moreover, in EDS, the claim had been reduced to judgment before the United States entered into the Agreement with Iran, and the district court relied in part on the existence of that judgment (op. 24).

thereby, it was hoped, to eliminate the necessity for review by this Court except by way of denial of a petition for certiorari or denial of applications for stays of orders vacating attachments. However, at the present time, there has still been no decision on these questions by the Court of Appeals for the Second Circuit. The absence of controlling precedent in that circuit is particularly significant, because there are more than 150 cases involving claims against Iran pending in the Southern District of New York, and the largest portion of the financial assets held by domestic banking institutions that must be transferred by July 19 are in that circuit. On June 5, 1981, following promulgation of the latest Treasury regulations, the Department of Justice has requested all district courts -- including the Southern District of New York -- where Iranian asset cases are pending that these courts vacate orders of attachment prior to June 19, 1981. That date is the date on which the Department of the Treasury indicated that it would seek civil and criminal sanctions against banks that did not transfer financial assets to the Federal Reserve Bank of New York as required by the regulations.11 / Similarly, on June 9, 1981, the government filed a motion in the Court of Appeals for the Second Circuit requesting that court to vacate attachments in the 96 consolidated cases pending there without waiting for further proceedings by the district court on remand. See New England Merchants National Bank v. Iran Power Generation & Transmission Co., Nos. 790, 1049-1144, 1145-1224, 1225-1227 (2d Cir. April 9,

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11 / See the government's Supplemental Memorandum, filed June 5, 1981, in Electronic Data Systems, Iran v. The Social Security Organization of Iran, supra.

1981), slip op. 2436 (retaining jurisdiction of these cases pending remand for further proceedings).12 /

Principles of sound judicial administration also weigh strongly in favor of certiorari before judgment here. There are more than 400 cases involving claims against Iran pending in district courts around the country. Review by this Court, which alone can furnish precedent that will control in all district courts, will allow for the orderly disposition of these cases and remove any remaining uncertainty about the validity of Executive orders and regulations implementing the Agreement with Iran.

For these reasons, the instant case plainly is one of "imperative public importance" requiring "immediate settlement in this Court" by means of certiorari before judgment. S. Ct. Rule 18. If the Court grants certiorari in this case, the Department of the Treasury will not seek to impose criminal and civil sanctions on persons who do not transfer assets to the Federal

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12 / Despite these most recent efforts to obtain a prompt decision from the courts in the Southern District of New York and the Second Circuit, we cannot be confident that those courts will reach a decision within the time required for the timely transfer of bank-held assets to the Federal Reserve Bank for subsequent transfer pursuant to the Agreement with Iran. Moreover, although we believe that the decisions of the First and District of Columbia Circuits are compelling precedent, if the Second Circuit or Southern District should nevertheless conclude that the President was without authority in some respects to enter into and implement the Agreement with Iran, the government would intend to seek immediate review in this Court in order that bank-held assets would be transferred by July 19. Because the Southern District and the Second Circuit have not yet ruled, there would be even less time for this Court to consider a petition for certiorari in those circumstances than there is here. We note as well that there has been no controlling ruling on the merits of these questions in the Ninth Circuit, although decisions of three district courts in that circuit have sustained the President's authority and the Ninth Circuit has denied a stay pending appeal in one of the cases. We therefore believe that the most prudent course involves immediate review by this Court in the instant case, which presents the same issues.

Reserve Bank by the June 19 deadline set forth in the June 4 revisions of the Treasury regulations (Pet. App. 152).

4. If the Court concludes that the petition for a writ of certiorari before judgment should be granted, the Court may wish to consider summary affirmance of the district court's order on the basis of the thorough opinions of the Courts of Appeals for the First and District of Columbia Circuits in Chas. T. Main International, Inc. v. Khuzestan Water & Power Authority, et al., and American International Group v. Islamic Republic of Iran, supra. For the Court's convenience, we are appending copies of those opinions to this Memorandum. We are also appending a copy of the government's brief in the latter case, which fully sets out the arguments in favor of the Presidential action challenged here.13 / Although the questions presented are indisputably of major public importance because of the number of claimants and cases affected, and plainly require immediate resolution, we believe that these questions are not particularly difficult and that the attached materials furnish a fully adequate basis on which to decide them. See S. Ct. Rule 23.1.

Petitioner obtained attachments of assets of the Iranian bank defendants after November 14, 1979, when President Carter issued Executive Order 12170 (44 Fed. Reg. 65729) freezing Iranian assets in this country. After issuance of that Executive Order, pre-judgment attachments of Iranian assets could only be obtained by means of a license obtained from the Treasury. 31 C.F.R. 535.201, 535.203, 535.310 (1980). The Department of the Treasury issued a blanket license for judicial proceedings with

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13 / See also the government is memorandum in support of its motion to dismiss the complaint in the district court (Pet. App. 90-105).

respect to Iranian property, including pre-judgment attachments (31 C.F.R. 535.418, 535.504(a) (1980)), but entry of a final judgment was expressly barred by the regulations (31 C.F.R. 535.504(b)(1) (1980)). However, such orders and licenses were explicitly made revocable at any time (31 C.F.R. 535.805 (1980). Thus, petitioner was on notice when it obtained its pre-judgment attachments that the license for such attachments could be revoked at any time. See also Orvis v. Brownell, 345 U.S. 183, 187 (1953). Thus, no unfairness to petitioner resulted when the President revoked these licenses and the district court ordered the attachments vacated. As explained in the opinions of the First and District of Columbia Circuits, the President's actions revoking the license for attachments and rendering those attachments of no legal effect were plainly authorized by the International Emergency Economic Powers Act (IEEPA). No lower court decision has taken a contrary position.

The First and District of Columbia Circuit opinions also amply sustain the power of the President to settle claims against Iran by providing for arbitration of those claims, particularly in the context of the grave international crisis resulting from the seizure of American hostages. See also 22 U.S.C. 1732.14 / Under Executive Order 12294 (Pet. App. 52), petitioner's claim against Iran is only suspended pending its presentation to the Claims Tribunal; its claim need not be dismissed outright. If that Tribunal determines that it does not have jurisdiction of

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14 / Petitioner's contention that the Foreign Sovereign Immunities Act implicitly divested the President of his authority to settle claims is in error for the reasons given by the First Circuit in its Charles T. Main opinion, at 20-21. That Act dealt with the question of immunity to suit, not whether the plaintiff in a suit against a foreign sovereign has stated a claim on which relief could be granted.

petitioner's claim, the claim may be reactivated in district court (Executive Order 12294, Section 3). If the Tribunal determines that petitioner should recover on its claim, that determination operates as a discharge of Iran's obligation only upon full payment of the award (ibid., Section 4). Thus, petitioner's claim in district court would be preserved if the award were not paid.

Hence, the President has provided a reasonable and fully adequate means for resolving claims against Iran and, consistent with the purposes of IEEPA, has assured the presence of funds to pay arbitration awards out of the Iranian assets that were frozen on November 14, 1979.

It is therefore respectfully submitted that the petition for a writ of certiorari before judgment should be granted, and the judgment of the district court should be affirmed.

WADE H. McCREE, JR.
Solicitor General

JUNE 1981

80-2078
No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership,
Petitioner,

—against—

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA and THE UNITED STATES OF AMERICA,
Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit Before Judgment

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Citibank, N.A., The Chase Manhattan Bank, N.A., Manufacturers Hanover Trust Company, European-American Banking Corporation, European-American Bank & Trust Company, Marine Midland Bank, N.A., The Bank of New York, Morgan Guaranty Trust Company of New York, The First National Bank of Chicago and Bank of America National Trust and Savings Association (the "Banks") respectfully move this Court

for leave to file the accompanying brief in this case as *amici curiae:*

1. Supporting the petition by Dames & Moore for a writ of certiorari before judgment, and

2. Supporting the motion by the United States for an order (i) expediting consideration of the petition, (ii) expediting the schedule for briefing and oral argument and (iii) dispensing with the printing of briefs and the joint appendix.

The Banks have an interest in the subject matter of this case in that they are holding in excess of $1.5 Billion for the account of Iran and various Iranian entities. The United States has ordered the Banks to transfer these Iranian assets by June 19, 1981 in order to implement by July 19, 1981 the executive agreement with Iran which resolved the hostage crisis. However, the Banks as well as many other garnishees, have been served with judicial orders of attachment which direct them to continue to hold the Iranian assets.

The Banks and other garnishees risk possible liability to attaching creditors if they transfer the Iranian assets as ordered by the United States or sanctions imposed by the United States if they fail to transfer the assets. Neither the Petitioner in this case nor any other party before this Court is faced with the dilemma confronting the Banks and other garnishees. The Banks have no reason to believe that any party before this Court is in a position to present the argument set forth in the following brief.

Accordingly, it is respectfully requested that the Banks be given leave to file the following brief as *amici curiae.*

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June 10, 1981

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No. 80-

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On Petition For a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit Before Judgment

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BRIEF OF AMICI CURIAE

INTRODUCTION

Citibank, N.A., The Chase Manhattan Bank, N.A., Manufacturers Hanover Trust Company, European-American Banking Corporation, European-American Bank & Trust Company, Marine Midland Bank, N.A., The Bank of New York, Morgan Guaranty Trust Company of New York, The First National

Bank of Chicago and Bank of America National Trust and Savings Association (the "Banks") respectfully submit this brief as *amici curiae:*

1. Supporting the petition by Dames & Moore for a writ of certiorari before judgment, and

2. Supporting the motion by the United States for (i) an order expediting consideration of the petition, (ii) expediting the schedule for briefing and oral argument and (iii) dispensing with the printing of briefs and the joint appendix.

The Banks hold for the account of Iran and various Iranian entities in excess of $1.5 Billion and have received judicial orders of attachment in over 150 cases. However, notwithstanding the court orders of attachment, the Executive Branch of the United States government has ordered the Banks to transfer the Iranian assets by June 19, 1981 in order to implement by July 19, 1981, the executive agreement with Iran which resolved the hostage crisis.

Unlike *Electronic Data Systems Corporation Iran v. The Social Security Organization of the Government of Iran, et al., cert. denied,* No. 80-2035 (U.S. June 8, 1981), which the Court properly declined to review earlier this week, the *Dames & Moore* litigation squarely presents the critical issue whether judicial orders of attachment prevent the Banks from complying with the Executive's order to transfer Iranian assets. Bank of America and affiliates[1] of certain other *amici curiae* are among the garnishees who were served with orders of attachment in *Dames & Moore v. Atomic Energy Organization of Iran, et al.,* No. CV 79-04918 LEW (C.D. Calif.), which is the "Underlying Action" (Pet. Br. at 4) to the case now before the Court in which Petitioner seeks an injunction against Respondents' "interference" with the attachments. A dispositive deci-

[1] Citibank International—Los Angeles, an affiliate of Citibank, N.A.; Chase Bank International-Los Angeles, an affiliate of The Chase Manhattan Bank, N.A.

sion by this Court is necessary[2] before the July 19, 1981 deadline for the United States to fulfill its obligations to cause the transfer of Iranian assets held by domestic banks.

THE CRITICAL ISSUE IS WHETHER EXISTING ORDERS OF ATTACHMENT PREVENT THE BANKS AND OTHER GARNISHEES FROM TRANSFERRING IRANIAN ASSETS AS ORDERED BY THE EXECUTIVE BRANCH.

In order to implement the executive agreement as required by July 19, 1981, the United States must "act to bring about the transfer to the Central Bank [to be selected by Iran and the United States], . . . of all Iranian deposits and securities in U.S. banking institutions in the United States . . . ." Declaration of the Government of the Democratic and Popular Republic of Algeria, par. 6. The Banks are holding Iranian deposits and securities subject to Executive Order 12170 which initially blocked their transfer, and Executive Order 12294 which now directs their transfer to the Federal Reserve Bank of New York, as fiscal agent of the United States. However, the Banks also have been served with orders of attachment prohibiting them from transferring the Iranian assets.

---

[2] Although numerous district courts and two courts of appeal have held that orders of attachment against Iranian assets must be vacated (*American International Group, Inc. v. Islamic Republic of Iran*, No. 80-02791 (D.C. Cir. May 22, 1981)) and *Chas. T. Main International, Inc. v. United States*, No. 81-1176 (1st Cir. May 22, 1981)), their decisions do not extend to the assets held in other jurisdictions. In New York, where over $1 Billion in Iranian assets are being held, the United States Court of Appeals for the Second Circuit on consolidated interlocutory appeal, remanded 96 cases to Judge Duffy in the Southern District of New York "with instructions to join the United States as a party in a single case in which issues raised by the Iranian Agreement and the Presidential Orders are squarely presented and to proceed with confirmation hearings in this case alone." *New England Merchants National Bank v. Iran Power Generation and Transmission Company, et al.*, Nos. 80-6254 *et seq.*, slip op. at 10 (2d Cir. Apr. 9, 1981). While the Court of Appeals retained jurisdiction, there has as yet been no decision on remand. A decision by this Court in *Dames & Moore* can effectively dispose of the same legal issues in the Second Circuit and elsewhere.

The Executive Branch has taken the position that the orders of attachment have been nullified by Executive Order and, therefore, are ineffective to prevent transfer of the Iranian assets.

The garnishee banks thus are caught directly between conflicting mandates of the judicial and executive branches. They face possible liability to the attaching creditors and sanctions for contempt of court if they transfer the assets in violation of the orders of attachment, but they risk civil and criminal liability if they fail to transfer the assets as ordered by the Executive. The garnishees need a dispositive decision, in an appropriate case such as *Dames & Moore,* determining whether the pending orders of attachment prevent them from transferring the Iranian assets.

Prompt resolution of the important constitutional issues presented by this case is vital to the national interest, and required before July 19, 1981 to prevent a default by the United States under the executive agreement with Iran. A proper case for this Court's consideration of these issues is one involving orders of attachment on garnishee banks. *Dames & Moore* is just such a case. It squarely presents the fundamental issue whether the actions of Presidents Carter and Reagan have a legal basis under the Constitution, as well as in the powers granted them by Congress under the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.* or otherwise.

The garnishees are demonstrably in need of a prompt resolution of the conflicting judicial and executive directives regarding the domestic Iranian assets.

Accordingly, we submit that the petition for writ of certiorari before judgment in the Court of Appeals be granted and that the Court grant the motion of the United States for expeditious consideration of the President's power to enter and implement the Iranian executive agreements.

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No. 80-2078

IN THE

Supreme Court of the United States

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT.

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Questions Presented for Review.

1. Whether the President has statutory or inherent constitutional authority (a) to extinguish statutory rights of American citizens to litigate commercial claims against foreign states and their agencies and instrumentalities in United States courts and (b) to nullify final judgments of United States courts adjudicating such claims?

2. Whether the President has statutory or inherent constitutional authority (a) to nullify attachments and judgment liens imposed by process of United States courts on property of foreign states and their agencies and instrumentalities to secure and satisfy enforceable commercial claims and judgments of American citizens and (b) to order the transfer of such property out of the reach of process of United States courts?

3. Whether, if the President has such authority, his exercise of it in this case constitutes a taking of property which should be enjoined in the absence of a reasonable, certain, and adequate provision for Petitioner's obtaining compensation?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Opinions Below 1

Jurisdiction 1

Constitutional Provisions, Statutes, Executive Agreements, Executive Orders and Regulations Involved 2

Statement of the Case 3

Summary of Argument 6

Argument 8

I.

The President Does Not Have Statutory or Inherent Constitutional Authority to Extinguish Statutory Rights of American Citizens to Litigate Commercial Claims Against Foreign States in United States Courts or to Nullify Final Judgments of United States Courts Adjudicating Such Claims 8

A. In Enacting the Foreign Sovereign Immunities Act, Congress Removed From the Domain of the Executive the Resolution of Commerical Claims by American Citizens Against Foreign States and Placed Such Claims Within the Jurisdiction of the United States District Courts 9

B. The President Has No Inherent Authority to Conclude Executive Agreements Extinguishing Statutory Rights of American Citizens to Litigate Commercial Claims Against Foreign States in United States Courts 17

1. Past Executive agreements do not support the Government's claim of inherent authority 18

Page

2. There is no judicial precedent for the Government's claim of inherent authority 19

3. Even if Congress has not expressly repudiated the type of Executive action taken here, the President's action cannot be sustained as an exercise of inherent authority 20

II.

The International Emergency Economic Powers Act Limits Presidential Authority to the Temporary Freezing of Foreign Assets and Withdraws the Executive's Former Authority Permanently to Dispose of Assets; The Act Does Not Permit a "Transfer" Order That Permanently Disposes of Foreign Property and Evades the Statutory Rights of American Creditors 23

III.

The President's Actions Here, Even if Authorized, Constitute a Taking of Property Without Just Compensation and Should Be Enjoined 33

A. The Nullification of Petitioner's Attachments, Judgment and Judgment Liens Constitutes a Taking of Property 35

B. There Is No Reasonable, Certain and Adequate Provision for Petitioner's Obtaining Compensation; Accordingly, the Presidential Actions Should Be Enjoined 40

Conclusion 44

TABLE OF AUTHORITIES

Cases Page

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) 12

American Int'l Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir., May 22, 1981) 17, 20, 34, 36

Armstrong v. United States, 364 U.S. 40 (1960) 33, 35, 36, 40

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 30

Becker Steel Co. v. Cummings, 296 U.S. 74 (1935) . 40

Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir., May 22, 1981) 17, 34, 42

Cherokee Nation v. Southern Kansas Railway, 135 U.S. 641 (1890) 40

Cities Service Co. v. McGrath, 342 U.S. 330 (1952) 40, 41

Clark v. Uebersee Finanz Korp., 332 U.S. 480 (1947) 32

Electronic Data Systems Corp., Iran v. Social Security Organization of the Government of Iran, No. CA3-79-218-F (N.D. Tex., June 7, 1981) 17, 22

Gray v. United States, 21 Ct. Cl. 340 (1886) 34

Gusseffeldt v. McGrath, 342 U.S. 308 (1952) 33

Hooe v. United States, 218 U.S. 322 (1910) 42

Hughes Aircraft Co. v. United States, 534 F.2d 889 (Ct. Cl. 1976) 42

Kent v. Dulles, 357 U.S. 116 (1958) 23

Louisville Bank v. Radford, 295 U.S. 555 (1935) 35, 36

Lyon v. Singer, 339 U.S. 841 (1950) 30

Page

Markham v. Cabell, 326 U.S. 404 (1945) 28, 33

Marschalk Co. v. Iran National Airlines Corp., No. 79, Civ. 7035 (CBM) (S.D.N.Y., June 11, 1981) 4, 17, 22, 40, 42, 43

Mayer v. Garvan, 278 F. 27 (1st Cir. 1922) 25

McCaffey Canning Co. v. Bank of America, 109 Cal.App. 415 (1930) 35

McCardle, Ex parte, 74 U.S. (7 Wall.) 506 (1868) ... 22

NBH Land Co. v. United States, 576 F.2d 317 (Ct. Cl. 1978) 42

Neilsen v. Secretary of the Treasury 424 F.2d 833 (D.C. Cir. 1970) 28, 29, 31

Orvis v. Brownell, 345 U.S. 183 (1953) 29, 30

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) . 43

Propper v. Clark, 337 U.S. 472 (1949) 25, 31

Provident Savings Life Assurance Society v. Ford, 114 U.S. 635 (1885) 36

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 40, 42

Reid v. Covert, 354 U.S. 1 (1957) 33

Rich v. Naviera Vacuba, 197 F.Supp. 710 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961) 13, 14, 15, 22

Richardson v. Simon, 560 F.2d 500 (2d Cir. 1977) ... 32

San Diego Gas & Electric Co. v. City of San Diego, 49 U.S.L.W. 4317 (March 24, 1981) 34

Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir. 1966) 31, 32

Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812) 11

Schooner General Pinkney v. United States, 9 U.S. (5 Cranch) 281 (1809) 19

Page

Seery v. United States, 127 F.Supp. 601 (Ct. Cl. 1955) 33

Silesian-American Corp. v. Markham, 156 F.2d 793 (2d Cir. 1946), aff'd sub nom. Silesian-American Corp. v. Clark, 332 U.S. 469 (1947) 30

Turney v. United States, 115 F.Supp. 457 (Ct. Cl. 1953) 33

United States v. Belmont, 301 U.S. 324 (1937) .. 19, 20

United States v. Goltra, 312 U.S. 203 (1941) 42

United States v. Guy W. Capps, Inc., 204 F.2d 665 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1954) 19

United States v. Klein, 80 U.S. (13 Wall.) 519 (1872) 22

United States v. North American Transportation & Trading Co., 253 U.S. 330 (1920) 42

United States v. Pink, 315 U.S. 203 (1942) 19, 20

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) 19

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 8, 16, 22, 23, 40, 42

Zittman v. McGrath, 341 U.S. 471 (1951) 25, 27, 29, 30, 31

Page

Constitutional Provisions, Statutes, and Rules

U. S. Const., art. I, §§ 1, 8 2
U. S. Const., art. II, § 2 2
U. S. Const., art. III, §§ 1, 2 2
U. S. Const., art. IV 2
U. S. Const., amend. V 2, 7, 33, 34, 35, 36
Foreign Sovereign Immunities Act, 28 U.S.C. §1330, §§ 1602, *et seq.* 2, 6, 9
International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, *et seq.* 2, 7, 17
International Emergency Economic Powers Act, 50 U.S.C. § 1702 ..... 26, 27
International Emergency Economic Powers Act, 50 U.S.C. § 1702(a) 32
International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1)(B) 25, 26, 27
International Emergency Economic Powers Act, 50 U.S.C. § 1706 26
Trading With the Enemy Act, 50 U.S.C. App. §§ 1, *et seq.* 7, 24
Trading With the Enemy Act, 50 U.S.C. App. § 5(b) 25, 26, 31
Trading With the Enemy Act, 50 U.S.C. App. § 5(b)(1) 25, 26, 27
Trading With the Enemy Act, 50 U.S.C. App. § 5(b)(1)(B) 25
Trading With the Enemy Act, 50 U.S.C. App. § 9 ... 26
Trading With the Enemy Act, 50 U.S.C. App. § 34 .. 26
Trading With the Enemy Act, 50 U.S.C. App. § 34(a) 26

3 U.S.C. § 301 2
22 U.S.C. § 1732 ..... 2, 17
28 U.S.C. § 1254 2
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1330 ..... 9, 10
28 U.S.C. §§ 1330-1332 2
28 U.S.C. § 1391 2
28 U.S.C. § 1491 42
28 U.S.C. § 1502 42
28 U.S.C. § 1606 10
28 U.S.C. §§ 1608-1611 10
28 U.S.C. § 1651 2
28 U.S.C. §§ 2201-2202 2
50 U.S.C. § 1631 2
50 U.S.C. App. §§ 1 *et seq.* 7, 24
50 U.S.C. App. § 9 26
50 U.S.C. App. § 34 26
50 U.S.C. App. § 34(a) 26
Fed. R. Civ. P. 54 2
Fed. R. Civ. P. 56 2
Fed. R. Civ. P. 64 2
Fed. R. Civ. P. 69 2

Executive Orders, Regulations,
and Executive Agreements

Exec. Order No. 12,279 ..... 5, 38
Exec. Order No. 12,279-12,281 2
Exec. Order No. 12,280 ..... 5, 38
Exec. Order No. 12,281 ..... 5, 38
Exec. Order No. 12,294 ..... 2, 5

Page

Iranian Assets Control Regulations, 31 C.F.R. Part 535 ..... 2, 37
31 C.F.R. § 535.203(e) (Nov. 15, 1979) 37
31 C.F.R. § 535.213 (46 Fed. Reg. 26,447, as amended by 46 Fed. Reg. —) 2
31 C.F.R. § 535.214 (46 Fed. Reg. 26,477, as amended by 46 Fed. Reg. —) 2
31 C.F.R. § 535.215 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. 26,477) 2
31 C.F.R. § 535.218 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. 26,447) 2, 39
31 C.F.R. § 535.218(b) 39
31 C.F.R. § 535.219 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. —) 2
31 C.F.R. § 535.221 (46 Fed. Reg. 14,335, as amended by 46 Fed. Reg. —) 2
31 C.F.R. § 535.222 (46 Fed. Reg. 14,335) 2
31 C.F.R. § 535.504 (46 Fed. Reg. 14,336, as amended by 46 Fed. Reg. 26,477) 2, 38
31 C.F.R. § 535.504(d) 38
31 C.F.R. § 535.579 (46 Fed. Reg. 14,336) 2
31 C.F.R. § 535.805 38

International Agreements

Agreement Covering the Settlement of Claims, May 11, 1979, United States-China, 30 U.S.T. 1957, T.I.A.S. No. 9306 32
Claims of U.S. Nationals, 1976, Egypt-U.S., 27 U.S.T. 4214, T.I.A.S. No. 8446 18
Settlement of Claims, 1979, People's Republic of China-U.S., 30 U.S.T. 1957, T.I.A.S. No. 9306 .. 18

Page

Legislative Materials

Amending the Trading With the Enemy Act: Hearing Before Subcomm. or International Finance of Sen. Comm. on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess., 6, 15-17 (1977) 26

87 Congressional Record 9862, 9865 (1941) 25

45 Dep't State Bull., 407-08 (1961) 13

Emergency Controls on International Economic Transactions: Hearings Before Subcomm. on International Economic Policy and Trade of House Comm. on International Relations, 95th Cong., 1st Sess. 217-18 (1977) 26

Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. (June 2 and 4, 1976), 24-25, 27-35, 50-53, 58-60, 61-66, 67, 86-87, 90 ..... 9, 10, 11, 12, 14, 15

House Committee on International Relations, Revision of Trading With the Enemy Act: Markup on H.R. 7738, 95th Cong., 1st Sess. 5 (1977) 24

H.R. Rep. No. 85, 65th Cong., 1st Sess. (1917) 25

H.R. Rep. No. 459, 95th Cong., 1st Sess. 7 (1977) . 24

H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976), reprinted in (1976) U.S. Code Cong. & Ad. News 6605, 6605-07, 6608, 6610-11, 6613, 6625-26 ..... 9, 10, 11, 12, 15

H.R. Rep. No. 2398, 79th Cong., 2d Sess. 1, 9-10 (1946) 25

Page

S. Rep. No. 113, 65th Cong., 1st Sess. (1917), reprinted in Subcomm. on International Trade and Commerce of the House Comm. or International Relations, Trading With the Enemy, 94th Cong., 2d Sess. 158, 160 (1976) 25

S. Rep. No. 1839, 79th Cong., 2d Sess. 2 (1946) ... 25

Treatises and Commentaries

Atkeson, Perkins & Wyatt, H.R. 11315 — The Revised State-Justice Bill On Foreign Sovereign Immunity: Time for Action, 70 Am. J. Int'l Law, 298, 311 (1976) 11

Bishop, Judicial Construction of the Trading With the Enemy Act, 62 Harv. L. Rev., 721, 723 (1949) ... 26

Goodman, United States Government Foreign Property Controls, 52 Geo. L.J., 767, 786 n.107, 793 n.148 797-98 (1964) 30, 31

Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953) 21

Iranian Assets Litigation Reporter (Andrews Publications) 140, 2501-02 (Feb. 20, 1981) 21, 37

Kahale & Vegas, Immunity and Jurisdiction: Toward a Uniform Body of Law In Actions Against Foreign States, 18 Colum. J. Transnat'l L. 211, 216 (1979) 12

1 Lillich & Weston, International Claims: Their Settlement by Lump Sum Agreements 229-33 (1975) ... 32

Littaver, The Unfreezing of Foreign Funds, 45 Colum. L.J., 132 (1945) 28

Page

Richard, Sovereign Immunity — Proposed Statutory Elimination of State Department Role — Attachment, Service of Process, and Execution, 15 Harv. Int'l L.J. 157, 170 (1974) 14

Note, Proposed Draft Legislation on the Sovereign Immunity of Foreign Governments: An Attempt to Revest the Courts With Judicial Function, 69 Nw. L. Rev. 302, 311-13 (1974) 13

Note, Sovereign Immunity — Limits of Judicial Control — The Foreign Sovereign Immunities Act of 1976, 18 Harv. Int'l L.J. 429, 436 (1977) 11

Note, The Foreign Sovereign Immunities Act of 1976: Giving The Plaintiff His Day in Court, 46 Ford. L. Rev. 543, 544, 548-49 (1977) 11, 13

Von Mehren, The Foreign Sovereign Immunities Act of 1976, 17 Colum. J. Transnat'l L. 33, 33 n. 1 (1978) 13

No. 80-2078

IN THE

Supreme Court of the United States

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents.

BRIEF FOR PETITIONER.

Opinions Below.

The Order of the United States District Court for the Central District of California to be reviewed is unreported. It is set out in the Appendix to the Petition for a Writ of Certiorari Before Judgment (the "Appendix"), filed on June 10, 1981, at page 106.[1] No opinion was issued by the District Court, but a Memorandum relating to the District Court's Order was issued. App. 161. No judgment or opinion has been issued by the Court of Appeals.

Jurisdiction.

The Order to be reviewed is an order of the United States District Court for the Central District of California filed

[1]The Appendix is hereinafter cited by page number as "App. ____."

May 28, 1981, entered June 2, 1981, in the action known as *Dames & Moore v. Donald T. Regan*, No. CV 81-2064 LEW (Px) (C.D. Cal., June 2, 1981) (the "Action Below"). Notice of Appeal from that Order to the United States Court of Appeals for the Ninth Circuit has been filed (App. 163), and the appeal has been docketed in the Court of Appeals as *Dames & Moore v. Donald T. Regan*, No. 81-5450 (9th Cir., filed June 4, 1981). App. 162. Jurisdiction is conferred on this Court to review a case pending in the Court of Appeals, prior to judgment, under 28 U.S.C. § 1254(1).

Constitutional Provisions, Statutes, Executive Agreements, Executive Orders, and Regulations Involved.

This case involves the following constitutional provisions, statutes, Executive agreements, Executive orders, and regulations: U.S. Const. art. I, §§ 1, 8, art. II, § 2, art. III, §§ 1, 2, art. IV, amend. V; Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.*; International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, *et seq.*; 3 U.S.C. § 301; 22 U.S.C. § 1732; 28 U.S.C. §§ 1254, 1330-1332, 1391, 1651, 2201-2202; 50 U.S.C. § 1631; Fed. R. Civ. P. 54, 56, 64, 69; Executive Orders Nos. 12,279-12,281, 12,294; Iranian Assets Control Regulations, 31 C.F.R. Part 535, §§ 535.213 (46 Fed. Reg. 26,447, as amended by 46 Fed. Reg. ____), 535.214 (46 Fed. Reg. 26,477, as amended by 46 Fed. Reg. ____), 535.215 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. 26,477), 535.218 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. 26,477), 535.219 (46 Fed. Reg. 14,334, as amended by 46 Fed. Reg. ____), 535.221 (46 Fed. Reg. 14,335, as amended by 46 Fed. Reg. ____), 535.222 (46 Fed. Reg. 14,335), 535.504 (46 Fed. Reg. 14,336, as amended by 46 Fed. Reg. 26,477), 535.579 (46 Fed. Reg. 14,336); the Declaration of the Government of the Democratic and Popular Republic of Algeria ("Assets Declaration"); and the Declaration of the Government of the Democratic and Pop-

ular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (''Tribunal Declaration''). The pertinent texts of the foregoing are set forth in the Appendix.

Statement of the Case.

The only factual record before the District Court, and this Court, is Petitioner's verified complaint (''Complaint''), which is set out in full, including exhibits, at App. 1-87. The Government did not contest any of the factual allegtions in the Complaint. The facts, as therein alleged, are hereinafter set forth.

Petitioner initially filed a suit in the United States District Court for the Central District of California against the Government of Iran (''Iran''), the Atomic Energy Organization of Iran (''AEOI''), and certain Iranian banks (the ''Bank Defendants''). *Dames & Moore v. Atomic Energy Organization of Iran*, No. CV 79-04918 LEW (Px) (C.D. Cal.) (the ''Underlying Action''). Complaint, Paras. 6 and 7. Thereafter, commencing in December 1979, the District Court issued writs of attachment; the writs were served on third parties in California; and property of certain of the Bank Defendants, including deposit accounts, was thereby attached to secure Petitioner's claims. Complaint, Para. 8.

On February 18, 1981, the District Court entered final judgment in favor of Petitioner against Iran and the AEOI in the amount of $3,788,930.79, plus interest. Complaint, Para. 6 and Exhibit A. The Underlying Action is still pending against the Bank Defendants. Complaint, Para. 7. In March 1981, the Superior Courts of Clark and Snohomish Counties, State of Washington, issued writs of execution and garnishment in enforcement of Petitioner's judgment, and a sheriff's execution sale of certain Iranian property was noticed in Clark County, State of Washington. Complaint, Para. 9 and Exhibits B and C.

On January 19, 1981, President Carter entered into the so-called Algerian Declarations (App. 21-35), in which he agreed that, in return for Iran's releasing America's hostages, the President would undertake, *inter alia*, to terminate all lawsuits of American citizens pending in the United States against Iran and its agencies and controlled entities, to nullify all attachments and judgments obtained by American citizens in such lawsuits, and to transfer out of the country all Iranian property here (estimated at $4,500,000,000). As part of the Algerian Declarations, the President and his Iranian counterparts agreed to set up an Arbitral Tribunal, to be funded initially with $1,000,000,000 of Iranian assets, to which some, but not all, American citizens might present their claims. Whether the Tribunal will function at all, when (if ever) it will complete its work, and whether it will be funded by Iran beyond the initial $1,000,000,000 are all unknown. *See Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM), slip op. at 82 (S.D.N.Y., June 11, 1981). Whether Petitioner's claim in its Underlying Action is within the jurisdiction of the Arbitral Tribunal is highly uncertain.[2]

On January 19, 1981, President Carter also issued a series of Executive orders implementing the Algerian Declara-

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[2]The Tribunal has no jurisdiction over:

> claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts . . . .

Tribunal Declaration, Art. II. App. 31. The contract on which Petitioner's Underlying Action is based provides:

> Any dispute or disagreement arising under this Contract shall first be discussed amicably by both parties. Failing agreement, such dispute or disagreement shall be submitted to conciliation. Each party shall have the right to appoint one conciliator and a third conciliator shall be appointed by the Plan and Budget Organization of the Government of Iran. In the event that either party is unwilling to accept the decision of the conciliation board, the matter shall be decided finally by resort to the courts of Iran.

Complaint, Para. 13.

tions. Among these, Executive Order Nos. 12,279, 12,280, and 12,281 (App. 43, 46, and 49) purport to nullify attachments on all Iranian property remaining in this country and to order persons holding Iranian property to transfer such property to the Federal R serve Bank of New York (for transfer by the Government to Iran) or directly to Iran. The Executive orders further purport to grant a "full acquittance" to persons who transfer Iranian property in compliance therewith, even in violation of judicial orders or other court processes, and purport to prohibit United States litigants from acquiring new interests, by judgment or otherwise, in Iranian property now in the United States.

On February 24, 1981 (after Petitioner's final judgment against Iran and the AEOI had been entered in the Underlying Action), President Reagan, who had inherited the Algerian Declarations from President Carter, issued Executive Order No. 12,294 (App. 52), which provides:

> All claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II of the [Tribunal Declaration], and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the Tribunal. During the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States . . . or in any action commenced in any such court after the effective date of this Order.

App. 52-53. This "suspension" of American claims is terminated if and when the Tribunal rules that it does not have jurisdiction over the claim. Any determination of the Tribunal on the merits is final and binding. App. 53.

The effect of the Algerian Declarations and the implementing Executive orders, if valid, on Petitioner's Underlying Action was devastating: Petitioner's final judgment against Iran and the AEOI, Petitioner's judgment levies on Iranian property, and Petitioner's attachments on property

of the Bank Defendants were all nullified; the property so liened as Petitioner's security was all to be transferred out of the country; and Petitioner was left only to take its claim to the Arbitral Tribunal, which might well conclude eventually that it had no jurisdiction over it.

To avert this emasculation of its rights, Petitioner filed the Action Below, seeking (1) a preliminary and permanent injunction enjoining the Government from interference with proceedings in, or related to, the Underlying Action, and (2) a declaratory judgment that the Algerian Declarations, and the implementing Executive orders and regulations, to the extent that they purported to authorize such interference, were beyond the constitutional and statutory powers of the President and therefore void. Prayer to Complaint, App. 10-12. Petitioner moved for a preliminary injunction, and the Government moved to dismiss Petitioner's Complaint for failure to state a claim upon which relief could be granted. By its Order filed May 28, 1981, entered June 2, 1981, the District Court denied Petitioner's motion and granted the Government's motion. App. 106. It is these rulings of the District Court that are now before this Court for review.

Summary of Argument.

The President has: (1) extinguished statutory rights of American citizens to litigate in United States courts commercial claims against a foreign state and its agencies and instrumentalities (hereinafter collectively "foreign state"), and nullified judgments on such claims; and (2) nullified judicial liens securing such claims, and ordered the transfer of all property so liened out of the country. Neither presidential action is authorized.

In the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602, *et seq.*, Congress, acting under its Article I powers, placed commercial claims of American citizens against foreign states squarely within the jurisdiction of federal district courts, and thereby removed the Executive

from its historic role in the resolution of such claims. The President's action here, removing such claims from United States courts and transferring them to an international forum, contravenes the express will of Congress.

Even were that not so, no President has ever done what has been attempted here. A review of the cases and international agreements cited by the Government reveals no Executive settlement of a commercial claim of a private American citizen against a foreign state pending and enforceable in an American court at the time of settlement. The President does not have any inherent authority to settle or remove enforceable claims of Americans properly before Article III courts.

The Government contends that the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701, *et seq.*, authorizes the President to nullify judicial liens on property of foreign states securing the claims of American creditors and to transfer the property so liened out of the country. IEEPA does authorize temporary blocking and freezing of foreign property. However, when read against the background of its predecessor statute, the Trading With the Enemy Act, 50 U.S.C. App. §§ 1, *et seq.*, and the legislative purposes of both Acts, IEEPA does not authorize the President permanently to transfer foreign property away from American creditors and back to a hostile power.

Even if the President's actions here were authorized, Petitioner's judgment, and its attachments and judgment liens securing the same, are property interests protected by the Fifth Amendment that have been taken for public use. Although the amount of compensation due Petitioner for these takings may not currently be quantifiable, the Fifth Amendment requires that Petitioner now be afforded a reasonable, certain and adequate provision for just compensation. In the absence of such provision, the President's actions should be enjoined.

ARGUMENT.

I.

THE PRESIDENT DOES NOT HAVE STATUTORY OR INHERENT CONSTITUTIONAL AUTHORITY TO EXTINGUISH STATUTORY RIGHTS OF AMERICAN CITIZENS TO LITIGATE COMMERCIAL CLAIMS AGAINST FOREIGN STATES IN UNITED STATES COURTS OR TO NULLIFY FINAL JUDGMENTS OF UNITED STATES COURTS ADJUDICATING SUCH CLAIMS.

In the various decisions arising out of the Algerian Declarations, the only ground of firm agreement among the lower courts has been that this Court's decision in the steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), is the guiding precedent and that the analytical framework set forth in Justice Jackson's concurring opinion in that case provides the most useful point of departure. Justice Jackson identified three categories into which the President's powers could fall. First, where the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. Second, absent a congressional grant or denial of authority, the President can rely only upon his own independent powers, although there is a "zone of twilight" in which he and Congress may have concurrent authority or in which the distribution of authority is uncertain. Third, where the President acts contrary to the will of Congress, he can rely only upon his own constitutional powers minus any constitutional powers of Congress, and his power is at its lowest ebb. *Id.* at 635-38 (concurring opinion).

Petitioner contends that the President's action here — abrogating Petitioner's statutory right of access to a United States court and the processes and judgments thereof — defies the will of Congress, must therefore be measured by the third and most restrictive of Justice Jackson's standards, and plainly fails under that test. The Government contends, however, that the President has simply exercised established presidential power to settle international claims.

There is no judicial authority or historical precedent, either long and uninterrupted or occasional and fleeting, that supports Executive authority to undertake action of the sort attempted here. Furthermore, the presidential action here in issue directly implicates other sensitive features of our Constitution's scheme of governance — the jurisdiction of the federal courts and orders and judgments issued by those courts. Even under Justice Jackson's intermediate standard of review, no less than under his most restrictive standard, the Executive action here cannot be sustained.

A. In Enacting the Foreign Sovereign Immunities Act, Congress Removed From the Domain of the Executive the Resolution of Commercial Claims by American Citizens Against Foreign States and Placed Such Claims Within the Jurisdiction of the United States District Courts.

After years of careful consideration, Congress in 1976 enacted the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602, *et seq.*[3] FSIA was passed to accomplish two overriding purposes: first, to enable American citizens to sue foreign states over commercial disputes in United States courts, and to provide a means to satisfy any judgments obtained; and second, to depoliticize these commercial lawsuits by taking them out of the arena of foreign affairs — where the Executive Branch is subject to pressures of foreign states seeking to avoid liability through a grant of immunity — and by placing them within the exclusive jurisdiction of the courts.[4]

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[3]*See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) ("FSIA House Report"), *reprinted in* [1976] U.S. Code Cong. & Ad. News 6605, 6608 (citations hereinafter are to U.S. Code Cong. & Ad. News pagination).

[4]FSIA House Report at 6605-07, 6610-11, 6613; *see Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. (June 2 and 4, 1976) ("*1976 House Committee Hearings*").

To accomplish these dual purposes, Congress exercised its constitutional authority, including specifically its authority to regulate foreign commerce and prescribe the jurisdiction of Article III courts, by vesting subject matter and personal jurisdiction in the federal district courts over commercial suits brought by United States claimants against foreign states. 28 U.S.C. § 1330; *see* FSIA House Report at 6611. Congress further fully codified the restrictive theory of sovereign immunity and provided that non-immune foreign states "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Congress also sought to insure that the rights of United States claimants against foreign states, as adjudicated by Article III courts, would be enforceable in this country. Thus, FSIA provides means to effect service on foreign states, procedures for attachments in certain circumstances, and, for the first time in United States law, the right to execute on the commercial property of foreign states in satisfaction of judgment. *Id.* §§ 1608-1611.[5]

Underscoring its intent to depoliticize private commercial disputes with foreign states, Congress declared that henceforth such disputes would be resolved in the courts without Executive interference:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions

[5]Before FSIA, American claimants who obtained judgments against foreign states had no means by which to enforce the judgments and were forced to rely upon diplomatic intervention for that purpose. *See* FSIA House Report at 6605, 6610-11, 6625-26; *1976 House Committee Hearings* at 28, 58-59.

are made on purely legal grounds and under procedures that insure due process.[6]

In addition to this explicit statement of purpose, the legislative history is replete with statements and testimony by members of Congress, the Executive Branch and the private bar emphasizing the urgent need to strip from the Executive the authority to terminate pending litigation through invocation of the immunity doctrine.[7] It is clear that Congress intended, through the enactment of FSIA, to avoid the very kind of bargaining away of American claimants' rights that is now being attempted through the Algerian Declarations.

Under the absolute theory of sovereign immunity adopted by judicial decision at the turn of the nineteenth century in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), foreign states were held immune from suit and courts would adhere to suggestions of immunity offered by the Executive on behalf of a defendant foreign state. *See, e.g., Ex parte Peru*, 318 U.S. 578, 587 (1943). In the early twentieth century, the increase in trade between foreign states and the nationals of another country led to international recognition of the restrictive theory of sovereign immunity — foreign states are not immune from suit based on their commercial or private acts.[8] This theory was even-

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[6]FSIA House Report at 6606; *see, e.g.*, Atkeson, Perkins & Wyatt, *H.R. 11315 — The Revised State-Justice Bill On Foreign Sovereign Immunity: Time For Action*, 70 Am. J. Int'l L. 298, 311 (1976); Note, *The Foreign Sovereign Immunities Act of 1976: Giving The Plaintiff His Day In Court*, 46 Ford. L. Rev. 543, 544 (1977); Note, *Sovereign Immunity — Limits of Judicial Control — The Foreign Sovereign Immunities Act of 1976*, 18 Harv. Int'l L.J. 429, 436 (1977) ("*Sovereign Immunity*").

[7]*See, e.g.*, FSIA House Report at 6605-07; *1976 House Committee Hearings* at 24-25, 27-35, 50-53, 58-60.

[8]Under the restrictive theory, "the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)." FSIA House Report at 6605. Even under the restrictive theory, however, execution against foreign state property was not permitted. *Id.* at 6606, 6625-26; *see, e.g., Sovereign Immunity* at 446-48.

tually adopted in the United States by the State Department in the Tate letter of 1952.[9]

Notwithstanding the Tate letter, the State Department found it politically infeasible consistently to resist demands of foreign states to dispose of pending litigation against them through suggestions of immunity.[10] Thus, private litigants remained subject to the vicissitudes of the international political arena, always subject to having their legal claims bargained away by the President when the foreign state was able to exert sufficient pressure:

> From a foreign relations standpoint, the initiative [was] left to the foreign state. The foreign state [chose] which sovereign immunity determinations it [would] leave to the courts, and which it [would] take to the State Department. The foreign state also decide[d] when it [would] attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria.

FSIA House Report at 6607.[11]

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[9]Letter from Jack B. Tate, Acting Legal Advisor to the Department of State, to Philip Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984 (1952). *See generally Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698-705 (1976) (tracing development of sovereign immunity doctrine in the United States).

[10]*1976 House Committee Hearings* at 25, 34-35; *see* FSIA House Report at 6606, 6608, 6610 (FSIA was "designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to 'suggestions of immunity' from the executive branch").

[11]*See 1976 House Committee Hearings* at 60 (testimony of Peter D. Trooboff, Co-Chairman, Committee on Transnational Judicial Procedure, ABA International Law Section: "The [State] Department then finds itself with a political problem that it did not create and which, more than not, it may not need or want. In these circumstances, it is fair to say that the 'bargaining chip' represented by a sovereign immunity case belongs to the foreign state — not to the Department"). Others have also noted that, prior to FSIA, private claims were sacrificed in the interests of foreign policy. *E.g.*, Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law In Actions Against Foreign States*, 18 Colum. J. Transnat'l L. 211, 216 (1979).

An example of the use of a private claim as a bargaining chip that achieved substantial notoriety (and was later cited during the committee hearings on FSIA) arose out of the hijacking of an American airplane to Cuba. *See,* Note, *Proposed Draft Legislation on the Sovereign Immunity of Foreign Governments: An Attempt to Revest the Courts With a Judicial Function*, 69 Nw. U. L. Rev. 302, 311-13 (1974) (discussing *Rich v. Naviera Vacuba,* 197 F. Supp. 710 (E.D. Va.), *aff d*, 295 F.2d 24 (4th Cir. 1961)). While the hijacked plane remained in Cuba, a Cuban commercial vessel was commandeered by its crew, who then sought asylum in the United States. After the Cuban vessel made port in the United States, several American claimants attempted to attach the vessel to satisfy outstanding commercial claims. Only two days earlier, Cuba had released the hijacked American airplane, stating that:

> [I]f the Government of the United States guarantees the right of immunity and sovereignty of the boats and airplanes belonging to the Cuban people that are seized in our country and taken to United States territory as proclaimed in the note submitted by the Government of the United States to the Security Council . . . the Government of Cuba will accord reciprocal treatment to American boats and airplanes that are in a similar situation.

45 Dep't State Bull. 407-08 (1961). Quickly responding to the Cuban statement, the State Department filed a suggestion of immunity in the actions pending against the Cuban vessel, resulting in dismissal of the actions. The result in the *Naviera* case was criticized both by commentators[12] and by Congress.[13]

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[12]*See, e.g.*, Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 Fordham L. Rev. 543, 548-49 (1977); Note, *Proposed Draft Legislation on Sovereign Immunity of Foreign Governments: An Attempt to Revest the Courts With a Judicial Function*, 69 Nw. U. L. Rev. 302, 311-13 (1974).

[13]*See* von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Transnat'l L. 33, 33 n.1 (1978) (shortly after *Naviera*, Senator Ervin introduced a bill designed "to provide means of redress for the unlawful seizure of American property by foreign governments," which bill would have removed the immunity defense in such cases).

During the committee hearings on FSIA, representatives of the Executive Branch candidly acknowledged that the State Department's suggestion of immunity practice, even under the Tate letter, worked to the disadvantage of United States foreign policy:

> I can't think of any [advantages] and may I say that I think there are some disadvantages attaching to the power of being able to enter a political judgment in the court because it means that the State Department becomes involved in a great many cases where we would rather not do anything at all, but where there is enormous pressure from the foreign government that we do something. . . . [I]n practice I would have to say to you in candor that the State Department, being a political institution, has not always been able to resist these pressures. And to my way of thinking, this consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see established.[14]

Not only did Congress thus remove the claims of private litigants from the control of the Executive Branch, but it expressly considered and rejected providing the Executive with flexibility to deal with emergency situations such as the airplane hijack situation exemplified by *Rich v. Naviera*

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[14] *1976 House Committee Hearings* at 34-35 (testimony of Monroe Leigh, Legal Advisor, Department of State); *cf. id.* at 59 (testimony of Peter D. Trooboff: "Under present law it may appear that the Department [of State] is able to fulfill certain foreign policy objectives by passing upon claims to immunity by foreign states against which actions are pending in American courts. The administration has concluded after long study that the relinquishment of this role under the pending bill would best serve the foreign policy interests of the United States"); Richard, *Sovereign Immunity — Proposed Statutory Elimination of State Department Role — Attachment, Service of Process, and Execution*, 15 Harv. Int'l L. J. 157, 170 (1974) (policy considerations weigh heavily in favor of eliminating Executive role: "First, if immunity is used as a political bargaining chip, it may be granted most often to sovereigns in relation to whom the interests of the United States are in jeopardy, with the result that enemies gain more from its use than allies").

Vacuba. Congress, after hearing the testimony of those opposed to, and the lone speaker in favor of, retaining any Executive flexibility in emergencies, concluded that the foreign policy of the United States would better be served, even in emergencies, by the absence of Executive control over such suits.[15] This view was forcefully stated by Congressman Flowers:

> [T]he so-called flexibility the State Department has under any present practice, if it is flexibility, is achieved at a price that is paid by some individual citizen or corporation. *That is not the way this Government does business and it is not the way we ought to do business.*[16]

In sum, then, FSIA represents a carefully considered congressional enactment expressly designed to confer upon American claimants a judicially enforceable right to sue foreign states for their commercial activities. To assure that those rights could not be destroyed by foreign state defendants through the political invocation of sovereign immunity, Congress insulated judicial proceedings from the foreign affairs role of the Executive Branch. What the Government seeks to do today is to reintroduce its political interference in judicial proceedings, ousting Petitioner from federal court, and depriving it of its judgment and liens

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[15] *See 1976 House Committee Hearings* at 24-32, 61-66, 67 (Congressman Danielson, in response to the suggestion that some Executive discretion should be left in FSIA to deal with political emergencies such as the *Naviera* hijack situation, stated his belief that eliminating the Executive's control over FSIA suits provided the Executive with a "strong[er] card" for foreign policy).

[16] *1976 House Committee Hearings* at 90 (emphasis added). Congress also exhibited sensitivity and resistance to allowing the Executive Branch the option to override or modify the guarantees of FSIA through future, unilateral Executive action. *1976 House Committee Hearings* at 51-52, 86-87. Congress deleted from FSIA a proviso in the State-Justice draft of the bill providing that FSIA should be subject to *future* international agreements, stating: "[I]t was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement." FSIA House Report at 6608.

against the Iranian defendants. In so doing, the Government flies in the very face of FSIA and would defy the will of Congress.

In these circumstances, Petitioner submits, the President's action should be measured by Justice Jackson's third and most restrictive standard in *Youngstown*:

> When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting on the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

343 U.S. at 637-38 (concurring opinion). The President's abrogation of statutory rights of access to the courts of this country in response to the hostage crisis can no more survive that standard than presidential seizure of private steel mills during time of war:

> A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority . . . labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was not deemed too high in view of the safeguards which these restrictions afford.

Id. at 613 (Frankfurter, J., concurring).

B. The President Has No Inherent Authority to Conclude Executive Agreements Extinguishing Statutory Rights of American Citizens to Litigate Commercial Claims Against Foreign States in United States Courts.

The Government suggests that the President has inherent constitutional authority to enter into the Algerian Declarations, stemming from his historical practice of settling claims of American citizens against foreign states.[17] Glossing over past Executive statements about the undesirability of using the claims of citizens in bargaining with foreign states, congressional disapproval of that practice through the enactment of FSIA, and the obvious conflict with the adjudicatory functions of Article III courts presently posed by implementation of the Algerian Declarations, the Government contends that a long-standing Executive claims settlement practice evidences congressional acquiescence in Executive abrogation of statutory rights like Petitioner's. However, neither the past Executive agreements settling claims nor any judicial precedent supports the President's purported ability to abrogate Petitioner's claim against Iran pending in court.

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[17]Notwithstanding FSIA, the Government argues that two statutes — the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701, *et seq.*, passed only months after the enactment of FSIA, and 22 U.S.C. § 1732, enacted over a century ago — authorize the President to "settle" Petitioner's claim. The Government is wrong. Neither IEEPA, *see American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779, slip op. at 27 n.15 (D.C. Cir., May 22, 1981); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, No. 80-1027, slip op. at 13-14 & n.13 (1st Cir., May 22, 1981); *Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM), slip op. at 18-20 (S.D.N.Y., June 11, 1981); *Electronic Data Systems Corporation, Iran v. Social Security Organization of the Government of Iran*, No. CA3-79-218-F, slip op. at 21 (N.D. Tex., June 7, 1981), nor Section 1732, *see American Int'l Group, Inc. v. Islamic Republic of Iran*, slip op. at 1-3 (Mikva, J., concurring); *Electronic Data Systems Corporation, Iran v. Social Security Organization of the Government of Iran*, slip op. at 20 & n.31, empowers the Executive to abrogate pending claims of domestic creditors against Iran.

1. Past Executive agreements do not support the Government's claim of inherent authority.

Petitioner does not dispute, and this case does not involve, the proposition that the Executive has some power to settle claims of United States citizens against foreign states. The issue in this case is the *scope* of that power. Nothing in the historical practice of claims settlements suggests that the Executive may, without congressional approval, abrogate statutory rights of citizens to litigate commercial claims against foreign states in United States courts.

Petitioner's counsel has reviewed some 89 Executive agreements involving claims settlements between the United States and other countries from 1799 through 1979, including all of those that have been cited by the Government. None of those agreements purports to terminate enforceable commercial claims of American citizens then pending in the United States courts or to nullify judgments, attachments, or judgment liens issued by those courts. Indeed, before FSIA, commercial claims against foreign states had little or no value in American courts, and the claimant needed the aid of the Executive to achieve any recovery.[18] Far from being another step in an historical continuum of agreements benefiting claimants without enforceable rights, the present

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[18]*See* Section IA *supra*. Since the effective date of FSIA, it appears that the President has entered into only two Executive agreements settling claims, neither of which purports to interfere in any way with any proceedings pending in United States courts. The two agreements were with Egypt, Agreement Concerning the Settlement of Claims, May 19, 1979, United States-Egypt, T.I.A.S. No. 9589, and with the People's Republic of China, Agreement Concerning the Settlement of Claims, May 11, 1979, United States-China, 30 U.S.T. 1957, T.I.A.S. No. 9306. The agreement with Egypt resolved claims which prior to FSIA the United States had broached diplomatically and which it had expressed its intention to negotiate. *See* Agreed Minute to Agreement Concerning Claims of United States Nationals, May 1, 1976, United States-Egypt, 27 U.S.T. 4214, 4228-30, T.I.A.S. No. 8446. The agreement with the People's Republic of China settled expropriation claims of U.S. nationals against China and unblocked assets of the PRC and its nationals.

Executive agreement marks a radical and novel departure from that pattern — depriving Petitioner of otherwise enforceable rights explicitly granted by an act of Congress.

2. There is no judicial precedent for the Government's claim of inherent authority.

The substantial majority of the Government's cases, most notably *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 107 (1801), involve treaties ratified by the Senate, not Executive agreements made unilaterally by the President. In *Schooner Peggy*, the officers and crew of a public armed vessel, commissioned by the President and operating under his instructions, brought a prize claim in admiralty seeking condemnation of a captured French ship. They had obtained a lower court condemnation sentence which was on appeal when, by treaty, the United States agreed to restore the ship to France. This Court held that the treaty constituted an intervening law that should be given effect on appeal. While *Schooner Peggy* does indicate that substantive law may be amended by treaty, it does not follow that the President, acting alone by Executive agreement, can change the substantive law or otherwise unilaterally terminate congressionally authorized litigation.[19]

Two other cases the Government relies on, *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), are likewise not on point. The cases are fundamentally Supremacy Clause cases, holding that the terms of an Executive agreement take precedence over a conflicting state law policy, *Belmont*, 301 U.S. at 331, or

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[19]*See United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 660 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1954). In addition to being a treaty case, *Schooner Peggy* is inapposite because the claimants were not private United States citizens but government agents asserting rights arising from their governmental authority. Moreover, the initial sentence of condemnation was on appeal and therefore had no effect at all, since in admiralty the appellate court hears the cause *de novo* "as if no sentence had been passed." *Schooner General Pinkney v. United States*, 9 U.S. (5 Cranch) 281, 283 (1809).

state court order, *Pink*, 315 U.S. at 233-34. While both cases mention the power of the President to settle claims through Executive agreement, they shed no meaningful light on the scope of that power. *See American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779, slip op. at 17 (D.C. Cir., May 22, 1981). Moreover, neither *Pink* nor *Belmont* involved the settlement of claims of American creditors.

3. Even if Congress has not expressly repudiated the type of Executive action taken here, the President's action cannot be sustained as an exercise of inherent authority.

Because the Algerian Declarations find no historical support in prior Executive agreements or judicial decisions, the Government cannot argue that Congress has acquiesced in past "settlements" such as the Algerian Declarations. Quite the opposite is true. In FSIA, Congress clearly acted to prevent Executive use of private claims, such as Petitioner's, as bargaining chips in the conduct of foreign affairs. Thus, the only constitutionally significant "acquiescence" at issue in this case is the Executive's previous willingness to relinquish its control over private commercial litigation against foreign states.

In light of the legislative history of FSIA — where the Executive stated that the political negotiation of private claims worked against United States foreign policy — this Court need not independently assess whether the power exercised in the Algerian Declarations is a necessary adjunct of inherent Executive authority in the realm of foreign affairs. The position of the Executive Branch on the need for FSIA reveals that the power to bargain with these private claims, even in political emergencies such as the hostage crisis, is not an indispensable element of inherent Executive

authority. This view seems to have been confirmed by the current Administration.[20]

Moreover, even apart from FSIA and assuming *arguendo* a silent record on the issue of Congress' approval or disapproval, such inherent power should not be presumed in view of its intrusion into the very core of authority the Constitution confers on the other coordinate branches. The Constitution explicitly grants Congress the authority to define the jurisdiction of the lower federal courts (and, within limits, the remedies they may provide).[21] Article III provides neither an implicit nor explicit role for the President in determining the jurisdiction of the federal courts. Even congressional interference with proceedings begun and properly before Article III courts is a matter of extreme constitutional sensitivity when, as here, it is undertaken not

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[20]Following a month-long study of the Algerian Declarations, the present Administration issued a statement that it would implement the prior Administration's agreement. However, the statement contained a number of important qualifications:

> . . . .
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> The review just completed did not consider: how could the whole crisis have been handled better; could a better set of agreements have been negotiated; *we did not consider whether these agreements should have been signed.*
>
> . . . .
>
> The conclusion of the agreements was a legal exercise of presidential authority. *This authority will be subject to challenge in our courts, and the Executive Branch will, of course, abide by the determination of our judicial system.* . . .
>
> It should be well understood that the decision to faithfully implement the agreements *does not represent a precedent* for future actions by the United States Government in similar situations. The present administration *would not have negotiated* with Iran for the release of the hostages. Future acts of state-sponsored terrorism against the U.S. will meet swift and sure punishment.

Iranian Assets Litigation Reporter (Andrews Publications) at 2501-02 (Feb. 20, 1981) (emphasis added).

[21]*See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953).

for general purposes but rather to affect the outcome of specific pending cases.[22] As District Court Judge Porter said:

> I know of no cases, and counsel have cited none, which hold that the Executive Branch may, without statutory authority, and without the approval of Congress (such as formal Senate consent to a treaty) negate valid exercises of the judicial power exercised pursuant to an express grant of jurisdiction from Congress.
>
> * * * *
>
> In the absence of any clearer Congressional approval of the exercise of this power with respect to claims that have gone to judgment pursuant to the Foreign Sovereign Immunities Act, I cannot conclude that the suspension and nullification of the judgment in this case is valid. To do so would leave the judiciary subject to the unbridled whims of the Executive Branch, and render the orders and judgments of courts acting pursuant to express Congressional grants of jurisdiction mere advisory opinions.

Electronic Data Systems Corp., Iran v. Social Security Organization of the Government of Iran, No. CA3-79-218-F, slip op. at 23, 24-25 (N.D. Tex., June 7, 1981); *see Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM), slip op. at 31-35 (S.D.N.Y., June 11, 1981); *cf. Rich v. Naviera Vacuba*, 197 F. Supp. 710, 718 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961) (the district court, applying the principles of *Youngstown*, rejected the Executive's attempt to block service of attachment by the marshal of the court: "There is no statute expressly authorizing the Executive to effectively destroy the judicial process for, without the ability to serve the court process, the doors of the court may be forever closed").

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[22]*See United States v. Klein*, 80 U.S. (13 Wall.) 519 (1872). *But see Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

Claims of inherent Executive authority to override the rights and liberties of individual American citizens are suspect.[23] If trading the statutory rights of Americans is indispensable to the President's conduct of foreign affairs, Congress may confer that power expressly and with attention to protecting American citizens against any injury caused by the President's exercise of that authority.

> Absence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law.

Youngstown, 343 U.S. at 603-04 (Frankfurter, J., concurring).

II.
THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT LIMITS PRESIDENTIAL AUTHORITY TO THE TEMPORARY FREEZING OF FOREIGN ASSETS AND WITHDRAWS THE EXECUTIVE'S FORMER AUTHORITY PERMANENTLY TO DISPOSE OF ASSETS; THE ACT DOES NOT PERMIT A "TRANSFER" ORDER THAT PERMANENTLY DISPOSES OF FOREIGN PROPERTY AND EVADES THE STATUTORY RIGHTS OF AMERICAN CREDITORS.

The Government argues that, apart from the President's purportedly unlimited power to "settle" legal claims of American citizens against foreign states, the President is authorized under IEEPA to order the "transfer" of Iranian

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[23] In *Kent v. Dulles*, 357 U.S. 116 (1958), this Court found no statutory authorization for withholding a passport because of a citizen's alleged communist beliefs and associations, and, at least implicitly, rejected as well any inherent Executive authority under the foreign affairs powers:

> [T]he right [to travel abroad] is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. *Youngstown Sheet & Tube Co. v. Sawyer*.

Id. at 129.

property from the United States and to "nullify" all outstanding writs of attachment against Iranian property. Thus, the Government contends, even if the President does not have the unlimited authority to commandeer and dispose of citizens' substantive legal claims against foreign states, Congress has authorized him to render those claims academic by ordering the transfer of the debtor's property beyond the jurisdiction of United States courts and the reach of American creditors. The awesome Executive power the Government would read into IEEPA is wholly inconsistent with the purposes and legislative history of the Act and is totally unprecedented either in peacetime or wartime.

IEEPA was enacted in 1977 to limit presidential emergency powers in peacetime. Previously, presidential emergency powers both in times of peace and of war were exercised under the Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. §§ 1, *et seq.*, which authorizes the President to take extraordinary measures, including summary seizure and vesting of foreign property. Observing that TWEA had become "essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review," Congress determined that such extreme wartime powers were inappropriate in peacetime emergencies. H.R. Rep. No. 459, 95th Cong., 1st Sess. 7 (1977) ("IEEPA House Report"). IEEPA's legislative sponsor noted that TWEA created "a dangerous situation in that it virtually conferred upon the President what could have been dictatorial powers . . . ." House Comm. on International Relations, Revision of Trading With the Enemy Act: Markup on HR 7738, 95th Cong., 1st Sess. 5 (1977) ("IEEPA House Markup"). To limit the breadth of Executive authority, IEEPA substituted a "new set of international economic powers, more restricted than those available during time of war . . . ." IEEPA House Report at 10.

TWEA confers upon the President a dual set of powers designed to prevent the transfer of foreign-held assets in the United States to hostile foreign nations and to secure those assets for the benefit of American creditors:[24] (1) the power temporarily to freeze or block the transfer of foreign-owned assets in the United States, 50 U.S.C. App. § 5(b)(1)(B);[25] and (2) the power summarily to seize and permanently vest title to foreign-owned assets and use them "for the benefit

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[24]*See, e.g., Mayer v. Garvan*, 278 F. 27, 35 (1st Cir. 1922). *See also Zittman v. McGrath*, 341 U.S. 471, 473-74 (1951); *Propper v. Clark*, 337 U.S. 472, 481, 484 (1949). Congress' major objective in enacting post-World War II amendments to TWEA was "to provide machinery for paying claims of creditors against the former owners of vested properties on an equitable basis to the extent that the assets vested from each debtor permit." S. Rep. No. 1839, 79th Cong., 2d Sess. 2 (1946); H.R. Rep. No. 2398, 79th Cong., 2d Sess. 1, 9-10 (1946).

[25]The legislative history of this provision indicates that when TWEA was first enacted in 1917, Section 5(b) limited the President's power to that of temporarily preserving the assets of an enemy. Congress retained for itself the power to determine whether and under what circumstances those assets should be returned to the enemy. S. Rep. No. 113, 65th Cong., 1st Sess. (1917), *reprinted in* Subcomm. on International Trade and Commerce of the House Comm. on International Relations, Trading With the Enemy, 94th Cong., 2d Sess. 158, 160 (1976) ("TWEA Report"); H.R. Rep. No. 85, 65th Cong., 1st Sess. (1917), *reprinted in* TWEA Report at 179, 181. In 1941, Section 5(b) was amended to provide the President permanent powers to vest, hold, use, administer, or liquidate the foreign property and at the same time, Congress also expanded the language in Section 5(b)(1)(B) describing the President's temporary blocking power. (The congressional debate is replete with references that the change in the language of Section 5(b)(1)(B) (the power temporarily to freeze foreign assets) was not intended to alter the fundamental nature of the blocking authority granted the President in 1917. *See, e.g.*, 87 Cong. Rec. 9862, 9865 (1941).) Significantly, Congress apparently concluded that the sweeping language in Section 5(b)(1)(B) of TWEA — which is relied upon by the Government today as it appears in Section 1702(a)(1)(B) of IEEPA as providing authority for it to dispose permanently of the Iranian assets attached by United States creditors — was insufficient to make a permanent disposition of enemy property. If, as Congress realized when it amended TWEA to add Section 5(b)(1), TWEA's Section 5(b)(1)(B) did not authorize the President permanently to dispose of foreign assets, Section 1702(a)(1)(B) of IEEPA — which precisely tracks the language of TWEA's Section 5(b)(1)(B) — clearly cannot be read to provide the President with any permanent property disposition power.

of the United States." *See id.* § 5(b)(1); Bishop, *Judicial Construction of the Trading With the Enemy Act*, 62 Harv. L. Rev. 721, 723 (1949). In connection with the second and more drastic set of seizing and vesting powers, Congress provided statutory protections for American creditors with claims against debtors whose assets were vested by the President. Specifically, American creditors of foreign nationals (and, following enactment of FSIA, foreign governments and their agencies) whose assets are seized or vested by the Executive may file their claims against the foreign debtor and are *entitled* to be paid out of those assets or their proceeds. 50 U.S.C. App. §§ 9, 34.[26]

IEEPA specifically excluded those portions of Section 5(b) of TWEA which authorized the President "(1) . . . to vest, *i.e.*, to take title to foreign property; (2) . . . to regulate purely domestic transactions; (3) . . . to regulate gold or bullion; and (4) . . . to seize records." IEEPA House Report at 15.[27] In sum, IEEPA continued the President's power

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[26]Section 34(a) provides:

> Any property or interest vested in or transferred to the Alien Property Custodian . . . *shall be* equitably applied by the Custodian . . . *to the payment of debts owed* by the person who owned such property or interest immediately prior to its vesting in or transfer. . . .

Id. § 34(a) (emphasis added). Section 34 also provides for a claims procedure, for priority and pro rata distribution among creditors when assets of the foreign debtor are insufficient to satisfy all valid claims, and for judicial review of administrative denial of claims. After Congress enacted Section 34, Section 9 proceedings were used for claims of secured creditors. *See generally* Bishop, *Judicial Construction of the Trading With the Enemy Act*, 62 Harv. L. Rev. 721 (1949).

[27]During deliberations over IEEPA, Congress did focus on the need to protect Americans with claims against foreign states for which there were no effective remedies — *i.e.*, claims against China and Czechoslovakia arising from expropriations during World War II and the Chinese Revolution. *Emergency Controls on International Economic Transactions: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 217-18 (1977); *Amending the Trading With the Enemy Act: Hearing Before Subcomm. on International Finance of the Sen. Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. 6, 15-17 (1977) ("*TWEA Senate Hearing*"); IEEPA House Markup at 6. To protect these claimants Congress granted the President the temporary power to freeze assets and negotiate settlements on behalf of these claimants. 50 U.S.C. §§ 1702, 1706; *see TWEA Senate Hearing* at 6, 15-17. Nothing in the history or language of IEEPA suggests, however, that this freezing power is broader than that under TWEA.

temporarily to "freeze" or "block" property of a foreign state but removed his powers under TWEA to "seize" or "vest 'any property or interest of any foreign country' . . . and to hold, use, administer, liquidate, sell, or otherwise deal with 'such interest or property' in the interest of and for the benefit of the United States." IEEPA House Report at 2, 4, 15.[28] *Compare* 50 U.S.C. App. § 5(b)(1) *with* 50 U.S.C. § 1702(a)(1)(B).

The section of IEEPA allowing the freezing of foreign assets empowers the President, upon declaration of a national emergency, to:

> [I]nvestigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.

50 U.S.C. § 1702(a)(1)(B). This section of IEEPA is taken verbatim from the freezing provisions of TWEA. Its broad language is unexceptional when considered in light of its original purpose in TWEA: to grant the President all possible authority to keep assets out of the control of hostile foreign powers during a war. In light of the derivation of Section 1702 and Congress' very reason for enacting IEEPA, however, there are at least two firm limits on the Executive power conferred by that elastic language. First, presidential authority is limited to *temporary* control over foreign assets by freezing or blocking transfers of possession or ultimate

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[28]Because, in contrast to TWEA, IEEPA did not grant the President the power permanently to vest and dispose assets, the need for explicit creditor protections like those in TWEA was alleviated. Nothing in the IEEPA legislative history hints that the President can under IEEPA abrogate the rights of creditors in a manner which would be forbidden under TWEA, or that he may turn IEEPA into a "confiscation measure." *Cf. Zittman v. McGrath*, 341 U.S. 471, 473-74 (1951) (custodian entitled to possess funds).

title; the section cannot empower the President permanently to dispose of the property. Second, presidential authority under IEEPA temporarily to freeze or block foreign assets cannot be greater than his analogous freezing power under TWEA.

The presidential action here broadly exceeds the authority granted him under IEEPA: far from temporarily freezing assets, as permitted by IEEPA, the President has ordered a permanent disposition of the foreign debtor's property by shielding it from the processes of American courts and ordering the property transferred overseas. The Government contends that this action is authorized under Section 1702(a)(1)(B) of IEEPA because the President has merely "directed" or "compelled" the "transfer" or "withdrawal" of the frozen assets. That construction, however, turns IEEPA on its head: under the Government's limitless reading of "transfer" and "withdrawal," the President can use the temporary freeze power that IEEPA confers to effect permanent disposition of foreign assets, a power IEEPA was intended to abolish.

The fundamental distinction between the authority to freeze foreign assets which IEEPA preserved and the vesting power which IEEPA abolished has always been that a freeze, however uncertain its precise duration, results in a temporary and not permanent disposition of foreign property. *See Markham v. Cabell*, 326 U.S. 404, 411 (1945); *Neilsen v. Secretary of the Treasury*, 424 F.2d 833, 843 (D.C. Cir. 1970). *See also* Littaver, *The Unfreezing of Foreign Funds*, 45 Colum. L.J. 132 (1945). Yet the President's "transfer" order here seeks to dispose of Iranian assets by permanently divesting American creditors of their statutory rights against the property. Once such transfer is effective, the freeze order will be "shorn of its temporary or interlocutory character,"

Neilsen, 424 F.2d at 844. The permanent "transfer" order here is for all practical purposes a vesting order.[29]

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[29]The Government has relied on *Orvis v. Brownell*, 345 U.S. 183 (1953), as support for that portion of the President's action "nullifying" all existing attachments of Iranian property. The Government's theory is that the Executive may forbid or regulate by license all attachments of and adjudication of rights in frozen assets, that the attachments here were only conditionally licensed, and that therefore the attachments can be nullified by "retroactive" revocation of the license. At best, however, that argument obscures the underlying issue — the scope of the Executive's authority under IEEPA. Whether or not the Executive may "nullify" existing attachments and forbid others during a freeze, he is attempting to exercise a far broader power here — the permanent transfer of foreign assets in derogation of the statutory rights of American creditors.

Furthermore, the Government's contention is incorrect — the license in this case was not subject to retroactive revocation. *See* Section III *infra*. This Court has squarely rejected attempts to nullify "retroactively" even unlicensed attachments of frozen assets and the adjudication of rights in the property as between a foreign debtor and an American creditor. *Zittman v. McGrath*, 341 U.S. 446 (1950).

Most importantly, the license here and its conditions are of no legal effect because the President's "freeze" authority does not empower him to regulate by license or forbid attachments of frozen property and adjudication of rights as between a foreign debtor and a domestic creditor that do not affect use, possession or control of the property during the freeze. Even under TWEA, this Court never decided whether under the freeze power the Executive "could . . . lump all attachments as prohibited 'transfers,' without reference to the nature of the rights acquired or steps taken under the various state laws providing for attachments . . . ." *Zittman v. McGrath*, 341 U.S. at 452.

Zittman upheld unlicensed attachments of, and judgments against, assets subject to a TWEA freeze order because no transfer of possession or ultimate title (as against the Alien Property Custodian) was involved. *Id.* at 463-64. In *Orvis*, the Government's leading authority, the Court held only that an unlicensed attachment was ineffective as against the Alien Property Custodian after he vested the property in the United States — *i.e.*, after he exercised the authority that IEEPA has now withdrawn from the President in peacetime. The attachment lien in *Orvis* did not create a priority to prevent pooling the property for distribution among all of the foreign debtor's creditors under Section 34 of TWEA. 345 U.S. at 188-89.

Assuming *Orvis* has any relevance in circumstances where the Executive has the power to freeze but not the power to vest, *Orvis* did not involve any nullification of an unlicensed judgment and attachment lien as between the foreign debtor and American creditor. Indeed, on that point *Orvis* reaffirmed *Zittman*. *Orvis*, 345 U.S. at 186-87. While it is true that dicta in *Orvis* referred to government "consent" to the

(footnote continued on following page)

The Government's construction of IEEPA's freeze authority to encompass the President's transfer of assets overseas is defective in another respect as well. That order would not be permissible under TWEA and the freeze power under IEEPA cannot be construed more broadly than under TWEA — IEEPA's freeze provision is taken verbatim from TWEA and IEEPA was enacted to limit Presidential power, not to expand it. If under TWEA the President ordered foreign property "transferred" to someone other than the Alien Property Custodian for other than a temporary period, he would evade the statutory protections provided for creditors of foreign debtors whose property was vested and thereby circumvent one of the principal purposes of the Act.[30] This

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unlicensed attachment in *Zittman*, *id.* at 187, nonetheless *Orvis* does not purport to decide the question relevant here and left unanswered in *Zittman*, 341 U.S. at 452 — whether the authority to freeze includes the power to forbid attachments and adjudications of rights in frozen property as between an American creditor and foreign debtor which do not affect the use, control or possession of the property during the freeze. *Zittman's* analysis of the statutory policy underlying the freeze authority strongly suggests it does not. *Id.* at 459-63. "Nothing in these state court proceedings have purported to frustrate the purposes of the federal freezing program. On the contrary, the effect of the State's action, like that of the federal, was to freeze these funds, to prevent their withdrawal or transfer to use of the [enemy]. . . . The sole beneficiaries are American citizens whose liens are not derived from the enemy but are adverse to enemy interests." *Id.* at 462-63; *accord*, Goodman, *United States Government Foreign Property Controls*, 52 Geo. L. J. 767, 797-98 (1964). *See also Lyon v. Singer*, 339 U.S. 841, 852 (1950); Brief of United States as Amicus Curiae at 33 n.31, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). That analysis applies even more forcefully under IEEPA where the Executive has no power over ultimate disposition of the property.

[30]In the only case in which the President's purported "transfer" power was discussed, the "transfer" involved a directive which sought physical possession of *vested*, not simply blocked, foreign property. *See Silesian-American Corp. v. Markham*, 156 F.2d 793, 795-96 (2d Cir. 1946), *aff'd sub nom. Silesian-American Corp. v. Clark*, 332 U.S. 469 (1947). If indeed the President could so clearly "transfer" alien assets under the freezing power to anyone and in any fashion he pleases, it is surprising that no President ever attempted to exercise such authority, either in connection with settlements in which foreign assets were unblocked or during World War II when the decidedly more inconvenient and more cumbersome vesting power was invoked.

Court's discussion in *Zittman v. McGrath*, 341 U.S. 471 (1951), of the relationship between Section 5(b) of TWEA and the statutory protections that TWEA provides for the claims of American creditors refutes any notion that TWEA's freeze power could lawfully be used to effect, as here, a "transfer" of a foreign debtor's property to the prejudice of the statutory rights of American creditors:

> While the statute under which the funds are to be "held, administered and accounted for" authorizes the vesting of . . . foreign-owned property in the Custodian and its administration "in the interest of and for the benefit of the United States," it is not for a confiscation measure, but a liquidation measure for the protection of American creditors.

Id. at 473-74.

Plainly the order directing the transfer of Iranian property out of this country will place those assets beyond the reach of American creditors and will, as a result, circumvent one of the principal legislative reasons for giving the President power over foreign assets: the preservation of such assets for the ultimate benefit of American creditors. *See Propper v. Clark*, 337 U.S. 472, 484 (1949); *Neilsen v. Secretary of the Treasury*, 424 F.2d 833 (D.C. Cir. 1970); *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 113 (2d Cir. 1966). *See also* Goodman, *United States Government Foreign Property Controls*, 52 Geo. L.J. 767, 786 n.107, 793 n.148 (1964).

Petitioner does not contend that the President is powerless under IEEPA to control the assets of a foreign state or national. On the contrary, his powers are vast with respect

to temporary disposition of those assets.[31] He is authorized, however, only to continue the freeze or to discontinue controls. It is one thing to allow blocking controls to expire, leaving American creditors to whatever judicial remedies they may then have, and quite another to act affirmatively to defeat the preexisting legal rights of American creditors to the benefit of the foreign debtor.

The mere incantation of the words "compel" and "transfer" should not be permitted to defeat the legislative purpose of granting the President the authority to freeze by transmuting the freeze power into a power of permanent disposition. This Court has frequently observed that TWEA, from which Section 1702(a) derives, must be read to conform to congressional policy notwithstanding certain literal interpretations of its words. In *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480 (1947), for example, the Court had to ignore the literal meaning of TWEA's language to implement what Congress obviously intended. The Court characterized TWEA as "hasty legislation which Congress did not stop to perfect as an integrated whole . . . . We are dealing here with conflict and confusion in the statute." *Id.*

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[31]The Government argues that one of the reasons for the blocking power was to freeze alien assets for possible future use in negotiating a settlement with the enemy. In two relatively recent cases, *Richardson v. Simon*, 560 F.2d 500 (2d Cir. 1977), and *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966), this purpose of foreign property controls was mentioned. To be sure the possible *unblocking* of billions of dollars of foreign assets previously frozen under a proper exercise of IEEPA authority is a powerful negotiating chip and has been used effectively in connection with settlements whereby, in exchange for an order unblocking assets, the foreign government has agreed to pay into a fund from which American claims would be paid. *See, e.g.*, Agreement Covering the Settlement of Claims, May 11, 1979, United States-China, 30 U.S.T. 1957, T.I.A.S. No. 9306 (Chinese assets unblocked; China pays United States more than $80 million). Yet even when the blocking authority has been used in this manner, the Government points to no instance in which the Executive has ever transferred to a foreign government — as it proposes to do in this case — the blocked assets. *See generally* 1 Lillich & Weston, *International Claims: Their Settlement by Lump Sum Agreements* 229-33 (1975).

at 488-89. So too in *Markham v. Cabell*, 326 U.S. 404 (1945), and *Gusseffeldt v. McGrath*, 342 U.S. 308 (1952), the Court disregarded the literal implications of TWEA's terms in order to apply the statute consistently with legislative intent. In *Gusseffeldt*, the Court cautioned:

> The concern with the Trading With the Enemy Act is with problems at once complicated and far reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against the literalness of application. It favors a wide latitude of construction in enforcing its purposes.

342 U.S. at 319. Petitioner urges that the same view should obtain with respect to IEEPA, TWEA's successor, when a construction of its terms is advanced that clearly contravenes its legislative purpose.

III.

THE PRESIDENT'S ACTIONS HERE, EVEN IF AUTHORIZED, CONSTITUTE A TAKING OF PROPERTY WITHOUT JUST COMPENSATION AND SHOULD BE ENJOINED.

The Fifth Amendment prohibition against taking private property for public use without just compensation was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The limitations upon governmental action contained in the Just Compensation Clause of the Fifth Amendment apply even in the area of foreign affairs. *See, e.g., Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955); *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953). Where Fifth Amendment rights collide with foreign commitments made under an Executive agreement, those foreign commitments must yield. *See Reid v. Covert*, 354 U.S. 1, 14 (1957).

Assuming the President's actions in nullifying Petitioner's judgment and judicially-created security interests in Iranian property were otherwise authorized, those actions present a classic case in which the Fifth Amendment must be applied either to enjoin the President's actions or to assure payment of compensation to those deprived of property as a result of those actions.[32] There is no doubt that the objective of the Algerian Declarations — obtaining the release of American hostages held by the Iranian government — was a public purpose and a legitimate foreign policy goal. However, the Algerian Declarations burden exclusively the resources of a group of American businessmen with the costs of compliance with the Iranian ransom demands. "When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large." *San Diego Gas & Electric Co. v. City of San Diego*, 49 U.S.L.W. 4317, 4326 (March 24, 1981) (Brennan, J., dissenting). *See also Gray v. United States*, 21 Ct. Cl. 340, 392-93 (1886). The President can no more determine that secured American creditors of Iran must sacrifice their property to finance the achievement of American policy goals, without receiving compensation, than he could

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[32]Petitioner contends that the President's "settling" of its underlying contract claims against Iran and Iranian instrumentalities also constitutes a "taking" for which compensation is due. However, the issue of whether or not the "settlement" of contract claims constitutes a "taking" for Fifth Amendment purposes may not yet be ripe for review. Petitioner reserves the right to seek just compensation from the Government for the taking of its contract claims at a later date if, for example, any of the following events occur: (1) Petitioner is denied the opportunity to present its claims to the Arbitral Tribunal; (2) Petitioner establishes that its rights before the Arbitral Tribunal are demonstrably inferior to its rights to obtain redress in federal court, *see Chas. T. Main Int'l Inc. v. Khuzestan Water & Power Authority*, No. 80-1027, slip op. at 23 (1st Cir., May 22, 1981); or (3) Petitioner's claim is adjudicated by the Arbitral Tribunal but its recovery is less than the amount it would have obtained by proceeding on its judgment in federal court. *See American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779, slip op. at 41 (D.C. Cir., May 22, 1981).

determine that those property owners whose land lies in the path of a transcontinental highway constructed to expand foreign trade with Mexico or Canada will receive nothing for the loss of their property.

A. The Nullification of Petitioner's Attachments, Judgment and Judgment Liens Constitutes a Taking of Property.

Petitioner's attachments of Iranian assets created valid liens under the law of California, and as such, constituted vested property interests. *McCaffey Canning Co. v. Bank of America*, 109 Cal.App. 415, 423 (1930). The benefits accruing to a lienholder or mortgagee have long been recognized as "rights in specific property which are of substantial value" which are protected by the Fifth Amendment against uncompensated takings by the Government for public use. *Louisville Bank v. Radford*, 295 U.S. 555, 601-02 (1935).

Thus, in *Armstrong v. United States*, 364 U.S. 40 (1960), materialmen in Maine had asserted liens against certain vessels built for the United States by a contractor. Upon the contractor's default, the United States took title to the uncompleted ships and all the manufacturing materials acquired by the contractor for the construction of the vessels. The materialmen contended that the transfer of title destroyed their liens and thereby constituted a taking of their property without just compensation in violation of the Fifth Amendment. This Court agreed, explaining:

> Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens. . . . Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circum-

> stances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment.

Id. at 48-49.

The existence of alleged alternative remedies under which a creditor might obtain satisfaction of his debts (such as the possibility that Petitioner's claim may be adjudicated by the Arbitral Tribunal) has no bearing on the question of whether Petitioner's property was taken by the destruction of its otherwise valid liens. In both *Armstrong* and *Louisville Bank*, the creditors were not foreclosed from all avenues of legal redress which might have produced at least partial payment of their claims. As this Court stated in *Armstrong*, it is the right "to resort to the specific property for the satisfaction of their claims . . . [that is] compensable by virtue of the Fifth Amendment." 364 U.S. at 44.

Petitioner's $3.8 million judgment against the Government of Iran and the AEOI is a separate and distinct property interest, *Provident Savings Life Assurance Society v. Ford*, 114 U.S. 635, 641-42 (1885), protected under the Fifth Amendment. The judgment represents a liquidation of Petitioner's claim such that Petitioner is able to levy against Iranian assets wherever they might be located. By purporting to nullify this judgment, the President's actions have appropriated this property interest for public use.[33]

The Government argues that Petitioner's attachments of Iranian property are not property interests for Fifth Amendment purposes, because the attachments were sought and obtained after the issuance of Iranian Assets Control Reg-

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[33]The Government contends that this judgment was void *ab initio*, because it was not authorized by the Regulations, and could therefore be nullified. But the President has no authority to nullify, or require presidential permission for, a judgment of an Article III court. *See American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779, slip op. at 35-37 (D.C. Cir., May 22, 1981). Moreover, IEEPA plainly does not authorize blocking of entry of judgment *per se* so long as no foreign property is liened or transferred.

ulations, 31 C.F.R. Part 535 (the "Freeze Regulations"), by the Department of the Treasury in November 1979. The Government contends that the Freeze Regulations provide that all attachments obtained subsequent to the issuance of those Regulations are subject to revocation by the Government; thus, it is the Government's position that it has not taken a valid lien from Petitioner.

The Freeze Regulations did not operate to transform Petitioner's valid liens into mere revocable privileges. Neither the proclamations of the President in describing his freeze orders to the public, nor the language of the Freeze Regulations themselves, support the Government's contentions that attachments obtained during the freeze are revocable. When the President issued his freeze orders, the communications from the White House to the American people and to Congress stated that a purpose of the Regulations was to benefit American creditors of Iran. For example, the White House press release of November 14, 1979, stated that "the purpose of this order [the order freezing Iranian assets] is to insure that claims on Iran by the United States and its citizens are provided for in an orderly manner." Iranian Assets Litigation Reporter (Andrews Publications) at 140 (Feb. 8, 1980). Similarly, the President released a statement to Congress on November 14, 1979, that the freezing of Iranian assets was to "enable the United States to assure that these resources will be available to satisfy lawful claims of citizens and entities of the United States against the Government of Iran." *Id.*

The plain language of the Freeze Regulations is fully consistent with the President's assurances to American creditors. The Regulations initially provided that "unless licensed or authorized pursuant to this part, any attachment, judgment, decree, lien, execution, garnishment or other judicial process is null and void with respect to any property in which on or since the effective date there existed an interest in Iran." 31 C.F.R. § 535.203(e) (Nov. 15, 1979).

Six days later, the Treasury added that "the provisions of this part and any rulings, licenses, authorizations, instructions, orders or forms issued thereunder may be amended, modified or revoked at any time." *Id.* § 535.805 (Nov. 21, 1979). Subsequently, the Freeze Regulations were amended to authorize judicial proceedings (subject to explicit exceptions, including a denial of the right to judgment) relating to Iranian property. *Id.* § 534.504 (Nov. 26, 1979). Prejudgment attachments were authorized a short time later. *Id.* § 534.504(d) (Dec. 4, 1979).

The Freeze Regulations stated that the Government reserved the right to revoke its license to obtain attachments; accordingly, no new attachments could be obtained by creditors after the date of revocation. The Freeze Regulations did not state that attachments obtained prior to any such revocation might be declared retroactively revoked upon the withdrawal of authorizations.

This construction is borne out by the Government's actions after the Algerian Declarations were executed by Iran and the United States. At that time the Government, realizing that compliance with Iranian demands required the nullification of the attachments it had previously allowed to be obtained, promulgated Executive Order Nos. 12279, 12280 and 12281 (App. 43, 46 and 49) each of which provides, with respect to various types of Iranian property:

> 1-102(a) All licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order, attachment, or otherwise, including the license contained in Section 535.504 of the Iranian Assets Control Regulations, with respect to the properties described in Section 1-101 of this Order are revoked and withdrawn.
>
> (b) All rights, power and privileges relating to the properties described in Section 1-101 of this Order and which derive from any attachment, injunction, other like proceedings or process, or other action in any

> litigation after November 14, 1979, at 8:10 a.m. E.S.T., including those derived from Section 535.504 of the Iranian Assets Control Regulations, . . . whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power, or privilege are hereafter barred from exercising the same.

These Executive orders do not simply consist of Paragraph 1-102(a), revoking and withdrawing the license to acquire attachments. The orders also contain Paragraph 1-102(b), which *separately* nullifies all rights, powers and privileges deriving from any attachments previously obtained. The additional Treasury regulations promulgated on February 26, 1981 to implement these Executive orders (the "Nullification Regulations") have exactly the same dual paragraph structure as the Executive orders. 31 C.F.R. § 535.218.

If the Government's position were correct, Paragraph 1-102(b) of the Executive orders (and the parallel section of the Nullification Regulations, 31 C.F.R. § 535.218(b)), would be irrelevant and unnecessary, because the revocation or withdrawal of the authorizations would have automatically terminated and extinguished attachments previously obtained under license. The fact that these provisions were drafted and published strongly suggests that the Government itself recognized that attachments obtained pursuant to the licenses extended by the Freeze Regulations had independent validity and that it was necessary separately to nullify them in order to meet the terms of the President's agreement with Iran.

The attachments that were obtained pursuant to Government authorization were not revocable and are property interests, the destruction of which invokes Fifth Amendment protections. Where "[t]here is a license which permitted a citizen to obtain property rights . . . [the] license may clearly be revoked, but such revocation means only that no future property interest may be obtained by a citizen. The

revocation does not in and of itself destroy property rights already acquired by a citizen." *Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM), slip op. at 78-89 (S.D.N.Y., June 11, 1981).

B. There Is No Reasonable, Certain and Adequate Provision for Petitioner's Obtaining Compensation; Accordingly, the Presidential Actions Should Be Enjoined.

Where, as here, the Government is acting to take private property for a public purpose, the taking need not be preceded or accompanied by the compensation. But the Fifth Amendment does require that there be "reasonable, certain and adequate provision for obtaining compensation . . . ." *Cherokee Nation v. Southern Kansas Railway*, 135 U.S. 641, 659 (1890), quoted in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974). Without this assurance of compensation, government action that amounts to a taking of private property is void. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952); *Becker Steel Co. v. Cummings*, 296 U.S. 74 (1935); *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

This constitutional requirement that compensation be assured is not lessened in this case by the fact that the exact dimensions of the taking of Petitioner's interests have not been established. To be sure, it is difficult for Petitioner to quantify the amount of damages it will suffer by reason of the nullification of its judgment, its attachments, and its judgment levies. Nevertheless, the decisions of this Court establish that the dimensions of the taking need not be certain in order for the Constitution to require assurance of Petitioner's right to compensation. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Armstrong v. United States*, 364 U.S. 40 (1960); *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952).

In *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952), for example, the Attorney General (as successor to the Alien Property Custodian) sought payment of two negotiable bearer debentures from the petitioners, who were the original obligor and the indenture trustee. The obligations represented by the debentures had been seized by the Alien Property Custodian under provisions of TWEA, upon a finding that the debentures were owned by a German resident and national, but the debentures were not in the possession of the Custodian. Thus the Court was faced with the "serious question . . . whether application of the seizure provisions of the Act to petitioners will take their property in violation of the Fifth Amendment, unless they have a remedy against the United States in the event a foreign court holds them liable to a holder in due course of the debentures." *Id.* at 334-35. While expressing skepticism as to whether this eventuality would occur, the Court agreed that there was a possibility of a foreign judgment that would effect a double recovery and held that petitioners would have the right to recoup from the United States in that event for a taking of their property. The Court stated: "[O]nly with this assurance against double liability can it fairly be said that the present seizure is not itself an unconstitutional taking of petitioners' property." *Id.* at 336.

There is no assurance of compensation in this case. Nothing in the various statutes claimed by the Government to authorize the President's actions here provides for compensation to those whose property is taken. Nor does the President have any inherent power to pay compensation:

> The President has no power to raise revenues. That power is in the Congress by Article I, Section 8 of the Constitution. The President might seize and the Congress by subsequent action might ratify the seizure. But until and unless Congress acted, no condemnation would be lawful. The branch of government that has the power to pay compensation for a seizure is the only

> one able to authorize a seizure or make lawful one that the President has effected.

Youngstown, 343 U.S. at 631-32 (Douglas, J., concurring) (footnotes omitted).

Nor is a remedy in the Court of Claims assured. The Tucker Act, 28 U.S.C. §§ 1491, *et seq.*, provides jurisdiction in the Court of Claims "to render judgment upon any claim against the United States founded . . . upon the Constitution . . . ." However, no remedy in the Court of Claims will be available if the President's actions here are deemed to be unauthorized. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127 n.16 (1974); *United States v. Goltra*, 312 U.S. 203 (1941); *United States v. North American Transportation & Trading Co.*, 253 U.S. 330 (1920); *Hooe v. United States*, 218 U.S. 322, 336 (1910); *NBH Land Co. v. United States*, 576 F.2d 317 (Ct. Cl. 1978); *see Youngstown*, 343 U.S. at 585. Even if the President's actions were authorized, jurisdiction in the Court of Claims may still be precluded by the treaty exception to jurisdiction, 28 U.S.C. § 1502, which states:

> Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations.[34]

The authorities are in conflict as to whether the treaty exception would bar Petitioner from seeking redress in the Court of Claims. *Compare Hughes Aircraft Co. v. United States*, 534 F.2d 889 (Ct. Cl. 1976), *and Chas. T. Main Int'l Inc. v. Khuzestan Water & Power Authority*, No. 80-1027, slip op. at 24, (1st Cir., May 22, 1981), *with Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ.

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[34]International Executive agreements may be treated the same as treaties for purposes of this section. *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 903 (Ct. Cl. 1976).

7035 (CBM), slip op. at 83-84 (S.D.N.Y., June 11, 1981). Further, the Government is unwilling to concede that a remedy lies in the Court of Claims, or indeed in any court. Thus, there is no assurance that a remedy exists in the Court of Claims.

In the absence of "reasonable, certain and adequate" provision for compensation, the presidential actions under review here cannot stand. Moreover, this instance of presidential taking without certain remedy creates for Petitioner precisely the type of irremediable injury that an injunction is designed to avoid. The President has taken Petitioner's judgment and the security for enforcing that judgment. Were Petitioner to proceed to the Arbitral Tribunal only to find either that the Tribunal had no jurisdiction or that insufficient funds were available to pay Petitioner's claim, and were Petitioner then to return to the courts of this country to find that the Court of Claims has no jurisdiction to hear Petitioner's claim for compensation, Petitioner would have suffered irreparable harm. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

CONCLUSION.

For the reasons stated, the Order of the District Court denying Petitioner's motion for a preliminary injunction and granting the Government's motion to dismiss the Complaint for failure to state a claim upon which relief may be granted should be reversed.

Dated: June 18, 1981.

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No. 80-2078

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In the Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, A PARTNERSHIP, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the President, during the declared national emergency following the seizure of hostages at the United States Embassy in Iran, had authority to regulate transactions in blocked Iranian assets and, as part of the settlement of the crisis, to terminate attachments and other conditional non-Iranian interests obtained in such assets pursuant to regulations and to direct the transfer of the assets as required by the terms of the settlement.

2. Whether the President, as part of the settlement with Iran, had authority to enter into an international agreement providing for submission to binding arbitration of outstanding commercial claims of United States nationals against Iran.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provisions and statutes and regulations involved	2
Statement	2
Introduction and summary of argument	13
Argument:	
I. The International Emergency Economic Powers Act authorized the President to block Iranian assets for use in settling the Iranian crisis and, as part of the subsequent resolution of the crisis, to direct the transfer of Iranian assets against which petitioner had obtained orders of attachment	18
A. The plain language of IEEPA authorized the President's actions with respect to Iranian assets:	
1. IEEPA empowered the President to freeze Iranian assets and subsequently to direct their transfer pursuant to the agreement with Iran	19
2. The President's authority to compel the transfer of blocked Iranian assets is not affected by attachments of those assets obtained by petitioner after the President issued the blocking order	23
B. The President's actions significantly further the historical purposes of Presidential Orders blocking foreign assets	27

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Argument—Continued Page

C. The President's actions are fully consistent with Section 5(b) of the Trading With the Enemy Act, after which IEEPA was patterned:

1. Interpretations of Section 5(b) of the TWEA support the President's actions under IEEPA 30

2. Sections 9(a) and 34 of the TWEA do not suggest that the President cannot order the transfer of frozen assets 36

II. The President validly exercised his authority to settle claims of United States nationals against a foreign country by providing for the presentation of such claims to the Iran-United States claims tribunal established under the agreement with Iran 39

A. The President acted within his authority in providing for settlement of claims of United States nationals against Iran:

1. The President's constitutional power to settle claims has been uniformly recognized by all three branches of government 40

2. The President validly exercised his claims settlement authority in this case 44

3. The President's authority to settle claims against Iran in the present case is also supported by treaty and statute 50

4. The claims settlement agreement does not interfere with the jurisdiction of the courts 53

Argument—Continued Page

B. The Foreign Sovereign Immunities Act did not implicitly divest the President of the authority to settle claims 56

C. The President's actions do not constitute a taking of property without just compensation 64

Conclusion 66

Appendix 1a

TABLE OF AUTHORITIES

Cases: Page

Acton v. *United States*, 401 F.2d 896, cert. denied, 393 U.S. 1121 36
Alling v. *United States*, 114 U.S. 562 47
American Bell Int'l, Inc. v. *Islamic Republic of Iran*, No. 80-321 (D.D.C. June 11, 1981), petition for cert. before judgment pending, No. 80-2111 (filed June 15, 1981) 29
American Int'l Group, Inc. v. *Islamic Republic of Iran*, Nos. 80-1779, 80-1891 (D.C. Cir. June 5, 1981) ..... *passim*
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 ..... 13, 28, 29, 43, 45
Behring Int'l, Inc. v. *Imperial Iranian Air Force*, 475 F. Supp. 383 ..... 26, 27
Blagge v. *Balch*, 162 U.S. 439 41
Bridge Co. v. *United States*, 105 U.S. 470 36
Chas. T. Main Int'l, Inc. v. *Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981) ..... *passim*
Chase Manhattan Bank v. *United China Syndicate, Ltd.*, 180 F. Supp. 848 33
Clark v. *Propper*, 169 F.2d 324, aff'd, 337 U.S. 472.. 33
Comegys v. *Vasse*, 26 U.S. (1 Pet.) 191 50
Commission for Polish Relief v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, 43 N.E. 2d 345 ..... 34, 35
DeVegvar v. *Gillilland*, 228 F.2d 640, cert. denied, 350 U.S. 994 62

Cases—Continued

	Page
E-Systems, Inc v. *Islamic Republic of Iran*, 491 F. Supp. 1294	26, 27
Electronic Data Systems Corp., Iran v. *Social Security Organization of Iran*, 610 F.2d 94, cert. denied, No. 80-2035 (June 8, 1981)	4, 27
Factor v. *Laubenheimer*, 290 U.S. 276	55
First National City Bank v. *Gillilland*, 257 F.2d 223, cert. denied, 358 U.S. 837	62
Gray v. *United States*, 21 Ct. Cl. 340	41
Great Western Ins. Co. v. *United States*, 19 Ct. Cl. 206, aff'd on other grounds, 112 U.S. 193	49
Honda v. *Clark*, 386 U.S. 484	37
Kolovrat v. *Oregon*, 366 U.S. 187	55
Logan v. *Secretary of State*, 553 F.2d 107	37
Lorillard v. *Pons*, 434 U.S. 575	31
Lyon v. *Singer*, 339 U.S. 841	28
Markham v. *Cabell*, 326 U.S. 404	37, 38
Marschalk Co. v. *Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981)	31, 34, 54, 60
Meade v. *United States*, 2 Ct. Cl. 224, aff'd, 76 U.S. (9 Wall.) 691	50
Mexico v. *Hoffman*, 324 U.S. 30	57
Miller v. *United States*, 583 F.2d 857	49
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267	61
New England Merchants National Bank v. *Iran Power Generation and Transmission Co.*, 502 F. Supp. 120, remanded, Nos. 740, 1099-1144, 1145-1224, 1225-1227 (2d Cir. Apr. 9, 1981), on remand, *Marschalk Co.* v. *Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981)	26, 27, 31
Nielsen v. *Secretary of the Treasury*, 424 F.2d 833	29
Orvis v. *Brownell*, 345 U.S. 183	16, 28, 33, 34
Ozanic v. *United States*, 188 F.2d 228	40, 45, 50
Pennhurst State School and Hospital v. *Halderman*, No. 79-1404 (Apr. 20, 1981)	58
Peru, Ex parte, 318 U.S. 578	45, 57
Peugh v. *Porter*, 112 U.S. 737	46

Cases—Continued Page

Propper v. *Clark*, 337 U.S. 472 ..... 15, 28, 34
Real v. *Simon*, 510 F.2d 557 ..... 28, 29
Richardson v. *Simon*, 560 F.2d 500, appeal dismissed, 435 U.S. 939 ..... 28, 29
Ruggiero v. *Compania Peruana de Vapores "Inca Capac Yupanqui,"* 639 F.2d 872 56
Sardino v. *Federal Reserve Bank of New York*, 361 F.2d 106 28
Unidyne Corp. v. *Government of Iran*, Civil Action No. 80-1029-A (E.D. Va., Mar. 30, 1981) 26
United States v. *Belmont*, 301 U.S. 324 54
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 ..... 30, 40, 44, 52, 53
United States v. *Fuller*, 409 U.S. 488 36
United States v. *La Abra Silver Mining Co.*, 29 Ct. Cl. 432, aff'd, 175 U.S. 423 49
United States v. *Pink*, 315 U.S. 203 ..... 17, 40, 43, 45, 52, 54, 58
United States v. *Sioux Nation of Indians*, No. 79-639 (June 30, 1980) 66
United States v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 ..... 18, 50, 54, 55, 56
United States v. *Weld*, 127 U.S. 51 46
United States v. *Yoshida International, Inc.*, 526 F.2d 560 52
United States ex rel. Angarica v. *Bayard*, 127 U.S. 251 46
United States ex rel. Boynton v. *Blaine*, 139 U.S. 306 ..... 41, 46, 49
Williams v. *Heard*, 140 U.S. 529 46
Williams v. *Oliver*, 53 U.S. (12 How.) 111 47
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 ..... 18, 43
Z. & F. Assets Realization Corp. v. *Hull*, 311 U.S. 470 ..... 43, 49, 62
Zittman v. *McGrath*, 341 U.S. 446 ..... 28, 29, 33, 34, 35

Constitution, treaties, statutes and rule:

United States Constitution:

Article II, § 3 52
Article VI 52, 61
Fifth Amendment 66

Constitution, treaties, statutes and rule—Continued Page

Agreement with United States-Spain, Feb. 11-12, 1871, 11 Bevans 540, T.S. No. 328-1 46

Para. 7 49

Arbitration Agreement between the United States and Canada Relating to the Gut Dam, Mar. 25, 1965, 17 U.S.T. 1566, 1569, T.I.A.S. No. 6114.... 50

Art. II(4) 50

Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853 .....17, 26, 50-51

Article IV(1) 51
Article IV(2) 51
Article IV(4) 51
Article XXI(2) 51, 52

Treaty with United States-Mexico:

Apr. 11, 1839, 9 Bevans 783, T.S. No. 205..... 46

Arts. X and XII 49

July 4, 1868, 9 Bevans 826, T.S. No. 212 46

Arts. II and V 49

Treaty with United States-United Kingdom, May 8, 1871, 12 Bevans 170, T.S. No. 133 46

Arts. XI, XIII, and XVII 49

United States-Bulgaria Claims Settlement, July 2, 1963, 14 U.S.T. 969, T.I.A.S. No. 5387 46

Arts. I(1) and III(2) 49

United States-Egypt Claims Settlement through Exchange of Notes, May 19, 1979, T.I.A.S. No. 9589 46

Arts. 3, 4, 6 and 7 49

United States-Hungary Claims Settlement, Mar. 6, 1973, 24 U.S.T. 522, T.I.A.S. No. 7569 46

Arts. 1(1), 6 and 7 49

Constitution, treaties, statutes and rule—Continued Page

United States-People's Republic of China Settlement, May 11, 1979, T.I.A.S. No. 9306 46

Arts. II(a) and V 49

United States-Poland Claims Settlement, July 16, 1960, 11 U.S.T. 1953, T.I.A.S. No. 4545 46

Arts. I(A), IV and V(B) 49

United States-Rumania Claims Settlement, Mar. 30, 1960, 11 U.S.T. 317, T.I.A.S. No. 4451 46

Arts. I(1) and IV 49

United States-Yugoslavia Claims Settlement, July 19, 1948, 12 Bevans 1277, T.I.A.S. No. 1803..... 46

Arts. 1(a) and 9(b) 49

United Nations Charter:

Art. 33 51

Art. 33(1) 51

Act of Aug. 8, 1946, ch. 878, Section 1, 60 Stat. 925 37

Act of Mar. 10, 1950, ch. 54, Section 4, 64 Stat. 13.. 42

Act. of Oct. 18, 1976, Pub. L. No. 94-542, 90 Stat. 2509-2513 61-62

Act of Aug. 2, 1977, Pub. L. No. 95-86, Section 708, 91 Stat. 444 42

Act of Oct. 13, 1980, Pub. L. No. 96-445, 94 Stat. 1891 63

Act of Dec. 28, 1980, Pub. L. No. 96-606, 94 Stat. 3534:

Section 701, 94 Stat. 3534 63

Section 702(5), 94 Stat. 3535 63

Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et seq.* 18

28 U.S.C. 1604 60

28 U.S.C. 1605 13

28 U.S.C. 1606 13

28 U.S.C. 1609 ..... 26, 34, 60

28 U.S.C. 1610(d) 13, 26

Constitution, treaties, statutes and rule—Continued Page

28 U.S.C. 1610(d) (2) 34
28 U.S.C. 1611(b) 13

International Emergency Economic Powers Act (IEEPA), 50 U.S.C. (Supp. III) 1701 *et seq.*..... 2-3, 15, 19

50 U.S.C. (Supp. III) 1701(a) 2, 16, 25
50 U.S.C. (Supp. III) 1701(a)(1) 29
50 U.S.C. (Supp. III) 1701(b) 31
50 U.S.C. (Supp. III) 1702(a)(1) ..19-20, 24-25, 30
50 U.S.C. (Supp. III) 1702(a)(1)(A) 22
50 U.S.C. (Supp. III) 1702(a)(1)(A)(ii) .. 21
50 U.S.C. (Supp. III) 1702(a)(1)(B) 15, 21, 22, 23, 25, 53
50 U.S.C. (Supp. III) 1702(b)(1) 31
50 U.S.C. (Supp. III) 1702(b)(2) 31
50 U.S.C. (Supp. III) 1703(b) 31
50 U.S.C. (Supp. III) 1706(a)(1) 29, 42

Trade Act of 1974, 19 U.S.C. 2438 42
Trading With the Enemy Act (TWEA), 50 U.S.C. app. 1 *et seq.*:

Section 5(b), 50 U.S.C. app. 5(b) 28, 30, 31, 32, 33, 36
Section 5(b)(1), 50 U.S.C. app. 5(b)(1)..... 30
Section 9(a), 50 U.S.C. app. 9(a) 36, 37, 38
Section 34, 50 U.S.C. app. 34 .....36, 37, 38
Section 34(i), 50 U.S.C. app. 34(i) 37

Reorg. Plan No. 1 of 1954, 68 Stat. 1279 42
3 U.S.C. 301 21
22 U.S.C. 1623(a) 42
22 U.S.C. 1623(h) 62
22 U.S.C. 1643-1643k 42
22 U.S.C. 1644-1644m 42
22 U.S.C. 1644(a)(5) 62
22 U.S.C. 1644b 62
22 U.S.C. 1732 .....17, 21, 52
31 U.S.C. 547 42
Fed. R. Civ. P. 37(b)(2) 5

Miscellaneous: Page

Amending the Trading With the Enemy Act: Hearing on H.R. 7738 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess. (1977) 30

P. Bator, M. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* (1973) 56

E. Borchard, *The Diplomatic Protection of Citizens Abroad* (1925) 47, 50

31 C.F.R. (1976 & 1980):

Section 515.203(e) 32
Section 515.504 32
Section 515.805 32
Section 535.201 ..... 3, 21, 22, 55
Section 535.203(a) 3, 22, 25
Section 535.203(c) 16
Section 535.203(e) 3, 22, 24, 32, 55
Section 535.213 10
Section 535.213(e) 10
Section 535.214 10
Section 535.214(e) 10
Section 535.215 10
Section 535.218 10
Section 535.218(b) 8
Section 535.221 10
Section 535.221(b) 10
Section 535.222 10
Section 535.310 ..... 3, 21, 22, 55
Section 535.418 24
Section 535.502 *et seq.* 3
Section 535.504 24
Section 535.504(a) 3, 24
Section 535.504(b) 55
Section 535.504(b)(1) 3
Section 535.504(b)(2) 27
Section 535.805 ..... 3, 22, 24

62 Cong. Rec. 13063 (1922) 43

79 Cong. Rec. 969-971 (1935) 41, 47

Miscellaneous—Continued Page

109 Cong. Rec. (1963):

pp. 21591-21595 41
pp. 25148-25149 41

Congressional Oversight of Executive Agreements—1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) 61

122 Cong. Rec. 33532 (1976) 26

Congressional Review of International Agreements: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 94th Cong., 2d Sess. (1976) 61

S. Crandall, *Treaties: Their Making and Enforcement* (1916) 47

[1973] *Digest of United States Practice in International Law* 49

Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations, 95th Cong., 1st Sess. (1977) 29-30, 32

Executive Order:

No. 12170, 44 Fed. Reg. 65729 (1979) 3, 20, 21
Nos. 12276-12285 10
Nos. 12277-12281, 46 Fed. Reg. 7915-7924 (Jan. 23, 1981) 3
No. 12279, 46 Fed. Reg. 7919 (1981) 23, 24, 25
No. 12280, 46 Fed. Reg. 7921 (1981) 24
No. 12281, 46 Fed. Reg. 7923 (1981) 24
No. 12294, 46 Fed. Reg. 14111 (Feb. 26, 1981) 9, 17, 39, 48

46 Fed. Reg. 14334-14335 (Feb. 26, 1981) 8, 10
46 Fed. Reg. 14336 (Feb. 26, 1981) 27
46 Fed. Reg. 30341 (June 8, 1981) 10
46 Fed. Reg. 31630 (June 16, 1981) 10

Miscellaneous—Continued Page

Final Report of H. H. Martin, Acting Agent of the United States Before the Mixed Claims Commission: United States and Germany (1941) 47
Foster, *The Treaty-Making Power Under the Constitution*, 11 Yale L.J. 69 (1901) 41
5 G. Hackworth, *Digest of International Law* (1943) 41
Hearings and Markup Before the Subcomm. on Asian and Pacific Affairs and on International Economic Policy and Trade of the House Comm. on Foreign Affairs on H.R. 2200: Adjudication of Claims Against Vietnam, 96th Cong., 1st Sess. (1979) 63
L. Henkin, *Foreign Affairs and the Constitution* (1975) 49, 50
H.R. Rep. No. 2398, 79th Cong., 2d Sess. (1946) 38
H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976) 26, 57, 59, 60, 61
H.R. Rep. No. 95-459, 95th Cong., 1st Sess. (1977) .. 16, 29, 30, 31, 32
H.R. Rep. No. 96-915, 96th Cong., 2d Sess. (1980) .. 63
2 C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2d rev. ed. 1945) 41, 45, 47, 49
Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. (1973) 59
Iran Asset Settlement: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs, 97th Cong., 1st Sess. (1981) 14
R. Lillich, *International Claims: Their Adjudication by National Commission* (1962) 47
R. Lillich & B. Weston, *International Claims: Their Settlement by Lump-Sum Agreements*, 2 Vols. (1975) 40, 46, 49
Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates Presidential Lump Sum Agreement*, 69 Am. J. Int'l L. 837 (1975) 41, 42

Miscellaneous—Continued Page

W. McClure, *International Executive Agreements* (1941) 41
McDougal & Lans, *Treaties and Congressional Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L.J. 181 (1945) 41, 51
6 J. Moore, *A Digest of International Law* (1906) .. 45, 49
J. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (1898) 47
Moore, *Treaties and Executive Agreements:* 20 Pol. Sci. Q. 385 (1905) 43, 47
William A. Parker *(United States v. Mexico), Opinions of Commissioners Under the Convention Concluded September 8, 1923 between the United States and Mexico* (1927) 45
Public Notice 753, 46 Fed. Reg. 25026 (May 4, 1981) 11
Restatement (Second) of Foreign Relations Law (1965) 49, 50, 51
Revision of Trading With the Enemy Act, Markup Before the House Comm. on International Relations, 95th Cong., 1st Sess. (Comm. Print 1977) 31
S. Exec. Rep. No. 5, 81st Cong., 2d Sess. (1950) 26
S. Exec. Rep. No. 5, 83d Cong., 1st Sess. (1953) 26
S. Rep. No. 1839, 79th Cong., 2d Sess. (1946) 37
S. Rep. No. 94-1188, 94th Cong., 2d Sess. (1976) 62
S. Rep. No. 94-1310, 94th Cong., 2d Sess. (1976) 57, 59, 60, 61
S. Rep. No. 95-466, 95th Cong., 1st Sess. (1977) 31, 32
S. Rep. No. 97-71, 97th Cong., 1st Sess. (1981) 43
Status of Claims Settlements with Nonmarket Countries, East German Claims Bill: Hearings on H.R. 14642 Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 2d Sess. (1976) 48, 62
A. Stuyt, *Survey of International Arbitrations* (1972) 47

Miscellaneous—Continued Page

Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 2d Sess., *Trading With the Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency* 557 *et seq.* (Comm. Print 1976) 32

The Mavrommatis Palestine Concessions, Judgment, P.C.I.J. Series A, No. 2 (1924) 52

15 Weekly Comp. of Pres. Doc. 2118 (Nov. 14, 1979) 20, 4a

M. Whiteman, *Damages in International Law:*

Vol. 1 (1937) 49
Vol. 3 (1943) 47
Vol. 8 (1967) 49

M. Whiteman, *Digest of International Law:*

Vol. 12 (1971) 41, 45
Vol. 14 (1970) 41

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2078

DAMES & MOORE, A PARTNERSHIP, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The order (Pet. App. 106-107) and memorandum (Pet. App. 161) of the district court are unreported.

JURISDICTION

The order of the district court was filed on May 28, 1981, and was entered on June 2, 1981. Petitioner filed a notice of appeal on June 3, 1981 (Pet. App. 163-164), and the appeal was docketed in the court of appeals on June 4, 1981 (Pet. App. 162). The petition for a writ of certiorari before judgment was filed on June 10, 1981, and was granted on June 11, 1981. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS INVOLVED

The two "Algerian Declarations," constituting an international agreement between the United States and Iran, and pertinent constitutional, statutory and regulatory provisions are set forth at Pet. App. 21-35, 108-159.

STATEMENT

On November 4, 1979, more than 50 American citizens were seized and held hostage at the United States Embassy in Tehran, Iran. That hostile and unprecedented act precipitated a crisis between the United States and Iran, which ultimately involved Iran's threat to withdraw its assets from this country, the President's declaration of a national emergency and the blocking of Iranian assets, the breaking of diplomatic relations, and the loss of American lives in a military rescue operation. On January 19, 1981, the United States and Iran peacefully resolved many of their outstanding disputes, reaching agreement for the release of the hostages, the settlement of claims, and the return of the blocked Iranian property. This case involves the legality of the President's actions undertaken in connection with this international agreement.

1. On November 14, 1979, in response to the taking of the American hostages and an Iranian threat to withdraw its assets from this country, President Carter declared a national emergency[1] pursuant to the International Emergency Economic Powers Act (IEEPA), 50

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[1] The President's declaration was accompanied by a finding, as required by 50 U.S.C. (Supp. III) 1701(a), that the situation in Iran constituted an "unusual and extraordinary threat * * * to the national security, foreign policy, or economy of the United States." Petitioner has not challenged the validity of that finding.

U.S.C. (Supp. III) 1701 *et seq.*, and issued Executive Order No. 12170 (44 Fed. Reg. 65729) (App., *infra*, 1a) blocking property of the Government of Iran, its controlled entities, and the Central Bank of Iran that was subject to the jurisdiction of the United States. Implementing Treasury Department regulations provided that any attachment of such property occurring after the blocking order was invalid without a license from the Secretary of the Treasury. See 31 C.F.R. 535.201, 535.203(a), 535.310, 535.502 *et seq.* (1980).

Shortly thereafter, on November 26, 1979, the Secretary granted a general license authorizing certain judicial proceedings against Iran, with the exception of the "entry of any judgment or of any decree or order of similar or analogous effect * * *." 31 C.F.R. 535.504(a), (b)(1) (1980). On December 19, 1979, the Secretary issued a clarifying regulation, stating that "[t]he general authorization for judicial proceedings contained in § 535.504 (a) includes pre-judgment attachment." 31 C.F.R. 535.418 (1980). The regulations have at all relevant times expressly provided that any license "may be amended, modified or revoked at any time" (31 C.F.R. 535.805 (1980)) and that without such a license any attachment is "null and void." 31 C.F.R. 535.203(e).

2. On December 19, 1979, subsequent to the President's blocking order,[2] petitioner filed suit in the United States District Court for the Central District of California against the Government of Iran, the Atomic Energy Organization of Iran (AEOI), and a number of Iranian banks that, petitioner asserts (Pet. 5), had been nationalized by the Government of Iran. *Dames & Moore* v. *Atomic Energy Organization of Iran*, No. 79-04918 LEW (Px) (C.D. Cal.). Petitioner alleged that it was a party to a written contract with AEOI, under

[2] In this respect petitioner's case is typical. We have been advised by counsel for Iran that only a few of the approximately 450 cases pending against Iranian entities as of the end of May 1981 involve complaints filed prior to the blocking order.

which it was required to conduct certain site studies for a proposed nuclear power plant in Iran.[3] The contract was terminated by AEOI on June 30, 1979, for the convenience of AEOI, as provided in the contract. Petitioner contended that it was owed $3,436,694.30 for services performed under the contract prior to the date of termination.[4]

Subsequent to the filing of petitioner's complaint, the district court issued orders of attachment directed against property of the defendants, and property of certain bank defendants was thereby attached to secure any judgment that might be entered against them.[5] On January 27, 1981, after the January 19, 1981 Agreement

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[3] Actually, the complaint states that the party to the contract was a wholly owned subsidiary of petitioner, Dames & Moore International, S. R. L., and that this entity had assigned its entire interest under the contract to petitioner. For convenience, we will regard petitioner as the party to the contract.

[4] The contract with AEOI provided that if any dispute arising thereunder could not be resolved by agreement between the parties, the dispute would be submitted to conciliation and, if either party was dissatisfied with the results of conciliation, "the matter shall be decided finally by resort to the courts of Iran" (Pet. 7 n.2). In its complaint in the action against the Iranian defendants, petitioner alleged that it had sought a meeting with AEOI for purposes of final settlement of all matters relating to the contract but that AEOI "has continually postponed said meeting and obviously does not intend that it take place" (Complaint in *Dames & Moore* v. *Atomic Energy Organization of Iran*, *supra*, at ¶ 27).

[5] We have not seen documents itemizing the attached assets, but we have been informed by counsel for petitioner that some of the assets on which attachments were obtained are held by domestic banking institutions and are therefore assets that must be transferred pursuant to the Agreement with Iran (see page 7, *infra*) by July 19, 1981. Again, petitioner's case is typical. Although there are outstanding orders of attachment against Iranian property in approximately 200 cases, we believe that only three claimants obtained attachments prior to the President's blocking order. The assets subject to these attachments are not subject to transfer. See the government's Memorandum in Opposition in *Electronic Data Systems Corp., Iran* v. *Social Security Organization of Iran*, cert. denied, No. 80-2035 (June 8, 1981).

with Iran but prior to President Reagan's February 24, 1981 Executive Order suspending claims (see page 9, *infra*), petitioner moved for summary judgment against AEOI and the Government of Iran (but not the Iranian banks).[6] On February 18, 1981, the district court granted petitioner's motion for summary judgment against AEOI and the Government of Iran for the amount claimed under the contract, plus interest.

AEOI and the Government of Iran filed a notice of appeal from this judgment on March 20, 1981. Petitioner attempted to execute on this judgment by obtaining writs of garnishment and execution in state court in the State of Washington, and a sheriff's sale of Iranian property was noticed in Washington to satisfy the judgment (Pet. 5-6; Pet. App. 15-18).[7] However, by order of May 28, 1981, as amended by order of June 8, the district court stayed execution of the judgment pending the appeal of that judgment by AEOI and the Government of Iran (Pet. App. 106-107). On May 28, 1981, the district court also ordered that all pre-judgment attachments obtained in the suit against the Iranian defendants be vacated and that further proceedings against the bank defendants be stayed (*id.* at 107).

3. a. On January 19, 1981, the United States and Iran entered into an Agreement to release the hostages and to settle other disagreements between the two nations. The Agreement is principally comprised of two Declarations of the Government of Algeria, to which the

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[6] The motion was accompanied by affidavits attesting to the amount owing under the contract and by a request pursuant to Fed. R. Civ. P. 37(b)(2) to prohibit AEOI and the Government of Iran from introducing any evidence in opposition to petitioner's motion for summary judgment as a sanction for AEOI's failure to comply with petitioner's discovery requests.

[7] Petitioner did not obtain a pre-judgment attachment of assets of the Government of Iran or AEOI, the two defendants against which judgments were entered.

United States and Iran adhered: (1) Declaration of the Government of the Democratic and Popular Republic of Algeria (hereinafter "Decl. I") (Pet. App. 21-29), and (2) Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (hereinafter "Decl. II") (Pet. App. 30-35).

The Agreement states that "the purpose of both parties" is "to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration" (Decl. I, ¶ B; Pet. App. 21-22). Iran and the United States agree that they "will promote the settlement of * * * claims" and that "[a]ny such claims not settled within six months * * * shall be submitted to binding third-party arbitration * * *" (Decl. II, Art. I; Pet. App. 30).

The Agreement establishes the Iran-United States Claims Tribunal, to which American claimants (with some exceptions) may present their claims. Awards of the Tribunal are "final and binding" (Decl. II, Art. IV, ¶ 1; Pet. App. 32) and are enforceable "in the courts of any nation in accordance with its laws" (Decl. II, Art. IV, § 3; Pet. App. 32). Iran has agreed to the payment of awards certified by the Tribunal in full, without limitation as to number or amount and without regard to the total amount of Iranian assets that previously remained in the United States. Iran also has agreed to the establishment of a security account, with an initial deposit of one half (up to $1 billion) of Iranian funds and securities currently held in banks in the United States, to satisfy awards to American claimants and has agreed to maintain a minimum balance of

$500 million in the account until all awards of the Tribunal have been paid (Decl. I, ¶ 7; Pet. App. 25).[8]

In connection with the establishment of the Tribunal, which offers American claimants the advantages of arbitration and frees them from the vagaries and hazards of domestic litigation against a foreign sovereign, the United States agreed, through the procedures provided in Declaration II, "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration" (Decl. I, ¶ B; Pet. App. 22). Furthermore, the United States must "act to bring about the transfer [of Iranian funds and securities held in banks in this country] within six months" from the date of the Agreement, *i.e.*, by July 19, 1981 (Decl. I, ¶¶ 6, 7;

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[8] Under the Agreement, the United States is not required to place any assets in a security account to fund Tribunal awards in favor of Iranian claimants.

As part of the agreements for the release of the hostages, the United States, on January 20, 1981, brought about the transfer to the Bank of England of some $8 billion of Iranian assets. These assets consisted of approximately $5.5 billion of Iranian funds, securities and deposits that were held in overseas branches of American banks, almost $2.4 billion of assets held by the Federal Reserve Bank of New York, and $40 million from the Foreign Military Sales Trust Fund. Also on January 20, $3.667 billion from these assets that were transferred to the Bank of England were returned to the Federal Reserve Bank of New York for the payment of unpaid principal and interest through December 31, 1980, on all loans and credits to Iran or its entities by syndicates of banking institutions of which American banking institutions were a member. These payments have already been made. A further $1.418 billion from the $8 billion transferred to the Bank of England were set aside in an escrow account and are to be used for the payment of nonsyndicated loans of American banks to Iran and its entities. Only about $2.9 billion of the $8 billion was actually returned to Iran.

Pet. App. 24-25). Failure to transfer the assets within the prescribed time might be regarded by Iran as a material breach of the Agreement and could jeopardize Iran's considerable financial undertakings on behalf of American claimants and cause the Tribunal to adjudge the United States in default, with potentially serious diplomatic and financial consequences for this country (see Decl. II, Art. II, ¶ 3; Pet. App. 31). See generally Declaration of Secretary of State Alexander M. Haig, Jr., ¶ 5 (Feb. 24, 1981) (App., *infra*, 2a-3a).

b. To fulfill the United States' commitment under these international agreements, President Carter, on January 19, 1981, issued a series of Executive Orders, pursuant to his authority under IEEPA, revoking the conditional license previously issued for pre-judgment attachments against Iranian assets,[9] nullifying non-Iranian rights in the assets acquired since the blocking order, precluding persons subject to United States jurisdiction from acquiring further interests in the blocked Iranian assets, directing those persons holding blocked Iranian funds and securities to transfer them to the Federal Reserve Bank of New York for disposition as the Secretary of the Treasury directs, and requiring those persons holding other Iranian property in the United States to transfer the property as directed by Iran. Executive Order Nos. 12277-12281, 46 Fed. Reg. 7915-7924 (Jan. 23, 1981) (Pet. App. 36-51).

After an exhaustive review of the terms of the Agreement, the present Administration determined that conclusion of the Agreement "was a legal exercise of Presidential authority" and that it should be "implement[ed]" because it "represent[s] the surest way of resolving many of the financial problems between the United States and Iran consistent with the interests of U.S. claimants

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[9] Neither the Executive Orders nor the implementing regulations, 31 C.F.R. 535.218(b) (46 Fed. Reg. 14334 (Feb. 26, 1981)), purport to terminate valid pre-judgment attachments acquired prior to November 14, 1979 against Iranian property. See note 5, *supra*.

and the broader interests of the United States in the Persian Gulf area, a region of strategic importance to the United States" (Haig Declaration, *supra*, ¶ 4; App., *infra*, 2a-3a). Accordingly, on February 24, 1981, in furtherance of the Agreement with Iran, President Reagan "suspended" "[a]ll claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II of the Declaration of the Government of * * * Algeria Concerning the Settlement of Claims * * *."[10] The President's order provides that, "[d]uring the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States * * *." Executive Order No. 12294, § 1, 46 Fed. Reg. 14111 (Feb. 26, 1981) (Pet. App. 52-54).[11]

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[10] President Reagan acted "in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy * * *, in light of the agreement with the Government of Iran * * * in order to implement Article II of the Declaration of Algeria concerning the settlement of claims[,] and to begin the process of normalization of relations between the United States and Iran." Executive Order No. 12294, 46 Fed. Reg. 14111 (Feb. 26, 1981) (Pet. App. 52).

[11] The Executive Order provides that if the Tribunal determines that it does not have jurisdiction over a claim, the suspension of that claim terminates. If the Tribunal (1) rejects the claim on the merits or (2) provides that a claimant shall have a recovery, and the claimant is paid the full amount of the Tribunal award, then either situation "shall operate as a final resolution and discharge of the claim for all purposes" (*Id.* at §§ 3, 4).

The Executive Order further provides that (1) the suspension applies to all requests for equitable or judicial relief in connection with claims that may be presented to the Tribunal under Article II; (2) the suspension applies to all claims either currently pending or filed after the date of the Order; (3) the commencement of an action for purposes of tolling a period of limitation is not precluded; (4) nothing in the Order requires dismissal of any action for want of prosecution; (5) nothing in the Order applies to any claim concerning the validity or payment of a standby letter of credit, performance or payment bond, or other similar instrument; (6) nothing in the Order prohibits the assertion of a counterclaim or set-off by a United States national in any

The Treasury Department has issued the appropriate regulations pursuant to the provisions of the various Executive Orders. See, *e.g.*, 31 C.F.R. 535.213, 535.214, 535.215, 535.218, 535.222, 46 Fed. Reg. 14334-14335 (Feb. 26, 1981) (Pet. App. 72-79). The regulations published on February 26 provided, *inter alia*, that "[u]ntil the Secretary * * * determines that the authority of the United States to order [the transfers required by the Executive Orders and regulations] has been the subject of a definitive legal ruling, the United States Government will not seek to impose * * * sanctions on any party who does not make [such transfers]." 31 C.F.R. 535.221(b), 46 Fed. Reg. 14335 (Feb. 26, 1981) (Pet. App. 76-77). After two courts of appeals had issued rulings upholding the Executive's authority to suspend claims against Iran and to direct the transfer of Iranian assets,[12] the Treasury Department on June 4, 1981, amended its regulations to require that banks and other persons holding Iranian financial assets must transfer them, under pain of civil or criminal liability, to the Federal Reserve Bank of New York by Noon, June 19, 1981. 31 C.F.R. 535.213, 535.214, 535.221, 46 Fed. Reg. 30341 (June 8, 1981). In view of this Court's grant of review in the present case, however, the Treasury Department has extended the transfer date. 31 C.F.R. 535.213(e), 535.214(e), 46 Fed. Reg. 31630 (June 16, 1981).

c. During the past two months, the United States and Iran have worked together to establish the organizational framework for the arbitral proceeding. Three arbitrators

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judicial proceeding pending or hereafter commenced by Iran or its entities; (7) Executive Order Nos. 12276 through 12285 are ratified; and (8) all powers granted the President by IEEPA are delegated to the Secretary of the Treasury for purposes of carrying out the Order (*Id.* at §§ 1, 2, 5, 6, 7, 8).

[12] *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981); *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, Nos. 80-1779, 80-1891 (D.C. Cir. June 5, 1981).

appointed by the United States met with the three Iranian arbitrators at the Peace Palace in The Hague beginning on May 18, 1981. On June 9, 1981, the arbitrators announced the selection of the three third-country arbitrators: Gunnar Lagergren, a former President of the Court of Appeal of Western Sweden, who will be President of the Tribunal; Nils Mangard, currently a judge of the Court of Appeal of Stockholm; and Pierre Bellet, recently retired as First President of the Cour de Cassation in France. The nine members of the Tribunal are scheduled to meet at The Hague beginning on July 1, 1981, for organizational purposes and related matters.

In addition, the Department of State has announced that it received a message from Iran stating that the "relevant Iranian organizations are prepared to start negotiations with the U.S. parties concerned [claimants]" and suggesting that the negotiations be carried out in London. Public Notice 753 (46 Fed. Reg. 25026 (May 4, 1981)). By a diplomatic note of May 7, 1981, Iran informed the State Department that it proposed to hold these negotiations in Vienna rather than London.

4. On April 28, 1981, petitioner filed the instant suit for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the Executive Orders and Treasury Department regulations implementing the Agreement with Iran in a way that would adversely affect its separate action against the Iranian defendants (Pet. App. 1-12). Petitioner contended that these Executive Orders and regulations are unconstitutional to the extent that they affect its final judgment against the Government of Iran and AEOI, its execution on that judgment in the State of Washington, its pre-judgment attachments of assets of the Iranian bank defendants, and its ability to continue to litigate against the bank defendants, against whom judgment has not yet been entered (Pet. App. 7-11).

By order dated May 28, 1981, the district court denied petitioner's motion for a preliminary injunction and dismissed petitioner's complaint for failure to state a claim upon which relief could be granted (Pet. App. 106-107). On June 8, 1981, the district court issued a memorandum stating that its order denying a preliminary injunction and dismissing the complaint were based on the arguments presented by the government in its motion to dismiss and its brief in support of that motion (*id.* at 161). The government's motion to dismiss and the brief in support thereof, relied upon by the district court, are reproduced at Pet. App. 88-105.

On June 3, 1981, petitioner filed a notice of appeal from the order denying a preliminary injunction and dismissing the complaint (Pet. App. 163-164), and the appeal has been docketed in the court of appeals (*id.* at 162). On June 8, 1981, the district court entered an injunction pending appeal preventing the federal government from requiring the transfer of Iranian property that is subject to any writ of attachment, garnishment, judgment, levy or lien issued by any court in favor of petitioner (*id.* at 167-168).

INTRODUCTION AND SUMMARY OF ARGUMENT

Although the President's primary motivation in blocking Iranian assets, entering into the Agreement with Iran, and issuing the Executive Orders implementing the Agreement was the protection of the national security and foreign policy of the United States, the President's actions also were designed to benefit Americans (such as petitioner) having claims against Iran. The President made clear when the November 14, 1979, blocking order was issued that it was "in response to reports that the Government of Iran [was] about to withdraw its funds" from the jurisdiction of the United States and that its purpose was "to ensure that claims on Iran by the United States and its citizens are provided for in an orderly manner" (App., *infra*, 4a). Petitioner and virtually all other plaintiffs in the more than 400 pending cases against Iran filed suit and obtained attachments of Iranian property *after* the blocking order. Thus, absent the President's blocking order, there may well have been no Iranian assets in the United States against which American claimants such as petitioner could have obtained orders of attachment.

Moreover, as the dearth of suits filed against Iran prior to the blocking order suggests, American claimants faced a variety of obstacles to recovery in United States courts. These obstacles included arguments by Iran in individual cases that (1) contacts with the United States were insufficient to support in personam jurisdiction against the Iranian governmental entity (28 U.S.C. 1605); (2) the Act of State doctrine (see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964)) barred expropriation claims; and (3) Iranian assets that might secure a final judgment were immune from pre-judgment attachment because they belonged to Iran's Central Bank (28 U.S.C. 1611(b)), because Iran had not explicitly waived its immunity from pre-judgment attachment (28 U.S.C. 1610(d)), or because the assets attached did not belong to the Iranian entity against which the plaintiff had a claim. In addition, many contracts on which

American claimants sought to recover, including petitioner's, provided for resolution of disputes in Iranian courts. See *Iran Assset Settlement: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 42 (1981).

The Agreement with Iran substantially removes these impediments and accomplishes the President's objective to protect American claimants. Approximately $3.667 billion have already been paid to syndicates of which American banks are members from blocked funds transferred by the President when the Agreement was reached, and a sufficient amount of the funds ($1.418 billion) remains in an escrow account in the Bank of England to satisfy the remainder of the American banks' outstanding loans to Iran. See note 8, *supra*. Furthermore, of the blocked assets held by domestic banks that must be transferred by July 19, 1981, half (up to $1 billion) will be used to fund a security account from which awards of the Iran-United States Claims Tribunal will be paid. To the extent that the total of American awards against Iran exceeds that amount, Iran has agreed to maintain a minimum of $500 million in the account until all awards have been paid. American claimants who received favorable awards from the Tribunal also will be able to sue to enforce their awards in any country (Decl. II, Art. IV, ¶ 3; Pet. App. 32).

In general, all claims arising out of "debts, contracts * * *, expropriations or other measures affecting property rights" are within the jurisdiction of the Tribunal (Decl. II, Art. II, ¶ 1; Pet. App. 30-31). Iran will not have available to it before the Tribunal the defenses of sovereign immunity, Act of State, and lack of personal jurisdiction. If the Tribunal decides that it does not have jurisdiction over a particular claim because of an exclusive forum clause in a contract or for some other reason, that claim will no longer be suspended under the terms of § 3 of Executive Order No. 12294 (Pet. App. 53). In that event, litigation on the claim can be resumed in United States courts, unaffected by the President's exercise of his claims settlement authority.

Whether or not a claim is within the Tribunal's jurisdiction, however, the Executive Orders implementing the Agreement require that all Iranian assets be transferred in accordance with the terms of the Agreement, irrespective of any orders of attachment against that property. This results not from the President's exercise of his power to settle claims, but from his distinct power under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. (Supp. III) 1701 *et seq.*, to direct the disposition of all foreign assets in time of a declared national emergency.

I.

Pursuant to the Agreement with Iran, the United States must transfer by July 19, 1981, blocked Iranian assets held by domestic banks to either the Security Account or to Iran. The failure to do so could be considered a material breach of the Agreement, with serious diplomatic and financial consequences for the United States. To fulfill that obligation, the President has terminated non-Iranian interests in blocked Iranian property and directed the transfer of that property.

These actions clearly are authorized by the language of IEEPA. That statute empowers the President to "regulate, direct and compel, nullify, void, prevent or prohibit, any * * * transfer" with respect to foreign property when, as here, he has declared a national emergency. 50 U.S.C. (Supp. III) 1702(a)(1)(B). Following the seizure of the hostages, the President's blocking order "prevented" and "prohibited" the transfer of any interest in Iranian property without authorization from the federal government. Thereafter, all transfers of interests in blocked property, including transfers pursuant to judicial order, were subordinate to the President's previously asserted right to control the disposition of the property and required a license from the Executive. *Propper* v. *Clark*, 337 U.S. 472 (1949).

The Treasury Department did license claimants to institute judicial proceedings, including pre-judgment at-

tachments and orders restraining transfer of Iranian assets. But, consistent with the prohibition against transfers of interests in that property, the license did not permit the entry or execution of a judgment with respect to Iranian property. Furthermore, the Executive expressly reserved the right to revoke any license at any time (31 C.F.R. 535.203(c) (1980)), thereby making the license for attachments conditional and ineffective against subsequent Executive directives pursuant to IEEPA. See *Orvis* v. *Brownell*, 345 U.S. 183 (1953). Hence, petitioner was on notice from the outset that the property subject to its attachments could be transferred if the President determined that the national interest so required.

Upon entering into the Agreement with Iran, the President revoked the license for pre-judgment attachments and other non-Iranian interests in Iranian property, and under IEEPA "directed" and "compelled" the transfer of the blocked assets to implement the Agreement. Because petitioner's attachments and those of virtually all other claimants were obtained *after* the President issued the blocking order, they were valid against Iran only while the revocable license permitting them remained in effect, and they were at all times subordinate to the President's paramount power to transfer the property subject to the attachments. Accordingly, those attachments do not prevent the transfer of the property by the President pursuant to the Agreement.

The President's actions are consistent with the purposes of IEEPA as well. IEEPA was enacted to enable the President to deal with unusual and extraordinary threats to the national security, foreign policy and economy of the United States (50 U.S.C. (Supp. III) 1701(a)), and granted the President economic powers sufficiently broad and flexible to enable him to respond as appropriate and necessary to unforeseen contingencies. H. R. Rep. No. 95-459, 95th Cong., 1st Sess. 1 (1977). By utilizing his IEEPA powers and controlling transfers of Iranian property, the President preserved the United States' ability to negotiate and implement an agreement with

Iran concerning the disposition of its property, which not only resolved the hostage crisis, but also provided a mechanism for the settlement of American claims against Iran for full value.

II.

The President has authority under the Constitution to settle outstanding international claims of American nationals. *United States* v. *Pink*, 315 U.S. 203 (1942). He has exercised that authority from the earliest days of the Republic, often by providing for the presentation of claims of American nationals to international arbitration. The President's constitutional authority repeatedly has been recognized and approved by Congress and, at least with respect to recent claims against Iran, has been supplemented by authority conferred on the President under 22 U.S.C. 1732, IEEPA, and the 1955 Treaty of Amity, Economic Relations, and Consular Rights with Iran.

Pursuant to these authorities, the President entered into a claims-settlement agreement with Iran, making arbitration the exclusive remedy for all claims within the jurisdiction of the Iran-United States Claims Tribunal. To implement the Agreement, the President suspended the domestic effect of all claims that may be presented to that Tribunal. Because a decision on the merits by the Tribunal and payment of any award operates as "a final resolution and discharge of the claim for all purposes" (Executive Order No. 12294, §§ 3 and 4; Pet. App. 53), litigation in the United States judicial system of claims that may be presented to the Tribunal should be stayed pending a decision by the Tribunal.

The Agreement and implementing Executive Orders and regulations do not infringe upon the jurisdiction of the courts. Rather, the exercise of the President's claims-settlement authority with respect to claims of American nationals against Iran works a substantive change in law

that the courts, in the proper exercise of their jurisdiction, are obliged to follow. This Court has long recognized that the law resulting from such international agreements is binding on pending cases in the courts. *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). Contrary to petitioner's argument, the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et seq.*, does not change this principle, nor does its language or legislative history purport to restrict in any way the President's authority to settle claims of American nationals against a foreign state.

Finally, as the two courts of appeals to decide the issue have held, petitioner's Fifth Amendment taking claim based on the exercise of the President's claims-settlement authority is premature. That argument is without merit in any event, because the effect of the Agreement is simply to provide that the same claims that are pending in United States courts will be heard in a different forum—the Claims Tribunal—capable of granting complete relief.

ARGUMENT

I. THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT AUTHORIZED THE PRESIDENT TO BLOCK IRANIAN ASSETS FOR USE IN SETTLING THE IRANIAN CRISIS AND, AS PART OF THE SUBSEQUENT RESOLUTION OF THE CRISIS, TO DIRECT THE TRANSFER OF IRANIAN ASSETS AGAINST WHICH PETITIONER HAD OBTAINED ORDERS OF ATTACHMENT

As Justice Jackson observed in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 634, 655 (1952) (concurring opinion), Presidential power is at its maximum when exercised with the express or implied authorization of Congress. The President's actions in this case—blocking Iranian assets, issuing revocable licenses for pre-

judgment attachments of those assets and then revoking the licenses and nullifying the attachments—clearly fall within that preferred category. Each of those acts is fully consistent with the language, purposes, and background of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. (Supp. III) 1701 *et seq.*

As we show below, in enacting IEEPA Congress recognized the necessity for the President to possess this authority to control dispositions of alien property in an effort to deal with external threats to the national security, foreign policy, or economy of the United States. Moreover, petitioner's pre-judgment attachments—which were obtained only because of a Treasury license (expressly made revocable) issued following the blocking order—are ineffective to prevent the President's decision to transfer the Iranian assets.

A. The Plain Language Of IEEPA Authorized The President's Actions With Respect To Iranian Assets

1. *IEEPA Empowered The President To Freeze Iranian Assets And Subsequently To Direct Their Transfer Pursuant To The Agreement With Iran*

"[T]he language of IEEPA," as the First Circuit has observed, "is sweeping and unqualified." *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981), at 9. The statute provides that, when the President has declared a national emergency with respect to a threat to the national security, foreign policy, or economy of the United States, he may, "under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—"

> (A) investigate, regulate, or prohibit—
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> * * * * *
>
> (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
>
> * * * * *

> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. (Supp. III) 1702(a)(1).

On November 14, 1979—ten days after the seizure of the American hostages in Iran and the day on which Iran threatened to withdraw Iranian assets from this country—President Carter invoked these powers under IEEPA and "order[ed] blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States." Executive Order No. 12170, 44 Fed. Reg. 65729 (1979) (App., *infra*, 1a). This order was supported by the President's finding "that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States" [13] and the requisite declaration of a national emergency "to deal with that threat" (*ibid.*). The seizure of the American hostages and the circumstances surrounding that seizure constituted a compelling basis for the President to invoke his powers under IEEPA in November 1979.[14] Petitioner does not contend

[13] The President stated in his report to Congress that the then-recent events in Iran and actions of the Government of Iran put at grave risk the personal safety of United States citizens and the lawful claims of United States citizens and entities against the Government of Iran. 15 Weekly Comp. Doc. 2118 (Nov. 14, 1979).

[14] That the seizure of the American hostages constituted a particularly appropriate occasion for the exercise of the President's

otherwise. The issue here is the extent and nature of the powers the President possesses under IEEPA in circumstances where the Act has been properly invoked.

The President's blocking order of November 14, 1979, which froze the status quo respecting Iranian assets subject to the jurisdiction of the United States, was fully consistent with the terms of IEEPA . The effect of the order was to "regulate or prohibit * * * transfers of credit or payment between, by, through, or to any banking institution" to the extent such transfers involved Iranian assets (50 U.S.C. (Supp. III) 1702(a)(1)(A)(ii)) and to "regulate, nullify, void, prevent or prohibit, any acquisition, * * * use, transfer, withdrawal, * * * or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving" frozen Iranian assets generally (50 U.S.C. (Supp. III) 1702(a)(1)(B)). See *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 9.

The President, in Executive Order No. 12170, delegated to the Secretary of the Treasury all powers granted by IEEPA in order to carry out the provisions of the blocking order. See 3 U.S.C. 301. The Secretary's comprehensive Iranian Assets Control Regulations specifically prohibited any transfer of property in which an Iranian governmental entity had an interest, unless the transfer was licensed by the Secretary. See 31 C.F.R. 535.201, 535.310 (1980). Of particular significance to the instant case, the regulations provided that, "[u]nless licensed, or authorized pursuant to this part any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void

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powers under IEEPA is established as well by 22 U.S.C. 1732, which authorizes the President to use such means, not amounting to acts of war, as he may think necessary and proper to obtain the release of any United States citizen who has been unjustly deprived of his liberty by or under authority of a foreign government. See pages 52-53, *infra*.

with respect to any property in which on or since the effective date there existed an interest of Iran" (31 C.F.R. 535.203(e) (1980)).[15] Thus, the transfer or creation of an interest in frozen Iranian assets pursuant to court order was treated in the same manner under the blocking order and implementing regulations as a voluntary transfer by Iran. Moreover, on November 19, 1979, before the licenses were issued, the Secretary issued a regulation clarifying that any "licenses * * * [and] authorizations * * * may be * * * revoked at any time." 31 C.F.R. 535.805 (1980).

This specific prohibition against unlicensed attachments, garnishments, executions and other forms of judicial process with respect to Iranian property is fully consistent with the President's broad authority under IEEPA to block foreign assets generally. In barring judicial process affecting frozen assets, except as authorized by the Secretary, the President simply exercised his express authority under IEEPA to "regulate, * * * nullify, void, prevent or prohibit" any "acquisition, holding, withholding, * * * [or] withdrawal [of,] * * * or exercising any right, power, or privilege with respect to" blocked property (50 U.S.C. (Supp. III) 1702(a)(1)(B)).[16]

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[15] In addition to the specific reference in 31 C.F.R. 535.203(e) to judicial process with respect to Iranian property, the term "transfer" is defined broadly for purposes of the regulations to include the "issuance, docketing, filing, or the levy of or under any judgement [*sic*], decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment" (31 C.F.R. 535.310 (1980)). As a result, the general prohibitions in 31 C.F.R. 535.201 and 535.203(a) (1980) against unauthorized "transfers" also apply to judicial process affecting Iranian property.

[16] As regards assets in banking institutions, the prohibition against judicial process also is within the terms of 50 U.S.C. (Supp. III) 1702(a)(1)(A), which authorizes the President to "regulate * * * or prohibit * * * transfers of credit or payments between, by, through, or to any banking institution." As noted above (see note 15, *supra*), the term "transfer" is defined broadly

The President's January 19, 1981, orders directing the transfer of Iranian assets in conformity with the Agreement with Iran (Pet. App. 21, 30)[17] fall as clearly within the terms of IEEPA as did the President's order and implementing regulations blocking those assets in the first place. Under IEEPA, the President may "*direct and compel* * * * *any* * * * transfer, withdrawal, * * * or exportation of, * * * or transactions involving, *any* property" in which a foreign country has an interest (50 U.S.C. (Supp. III) 1702(a)(1)(B)) (emphasis added). See *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority, supra*, at 9.

2. *The President's Authority To Compel The Transfer Of Blocked Iranian Assets Is Not Affected By Attachments Of Those Assets Obtained By Petitioner After The President Issued The Blocking Order*

As explained above, the President's actions in freezing Iranian assets upon the onset of the hostage crisis and then ordering the transfer of those assets when the President entered into the Agreement with Iran are at the very core of the broad authority expressly conferred upon the President by IEEPA. Petitioner nonetheless contends (Pet. 19-25) that IEEPA does not authorize the President to order the transfer of any Iranian assets that are subject to writs of attachment it obtained against the Iranian bank defendants in federal district court in December 1979 and the first months of 1980 or the writs of execution and garnishment it obtained against

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in the regulations to include attachments and other forms of judicial process.

[17] For example, § 1-101 of Executive Order No. 12279 (46 Fed. Reg. 7919 (1981)) (Pet. App. 44) "licensed, authorized, directed and compelled" banking institutions that hold financial assets of Iran to transfer those assets, with interest from November 14, 1979, to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury.

the Government of Iran and AEOI in Washington state court in March 1981 to satisfy its judgment (see Pet. App. 15-20). Petitioner's argument ignores the fact that writs of attachment, execution, or garnishment are explicitly barred by the Iranian Assets Control Regulations unless authorized by the Secretary (31 C.F.R. 535.203(e) (1980); see pages 15-16, *supra*).

The Secretary did issue a general license or authorization for judicial proceedings with respect to Iranian property (31 C.F.R. 535.504(a) (1980)), including an authorization for pre-judgment attachments, (31 C.F.R. 535.418 (1980)). As we explain in Point C (see pages 33-36, *infra*), however, post-blocking order attachments of Iranian property obtained pursuant to this general authorization in connection with litigation against Iran necessarily were contingent upon and subordinate to the President's previously invoked authority under IEEPA to compel the transfer of the property. Such attachments therefore did not create an interest in the property that could be asserted against or bind the President and that could thereby frustrate his plenary control of the property and prevent him from transferring it as the national interest requires.

Moreover, even as against Iran, the authorization for attachments explicitly *was made revocable at any time* (31 C.F.R. 535.805 (1980)), and that authorization was in fact revoked in the January 19, 1981, Executive Orders issued by President Carter.[18] IEEPA grants the President the unrestricted power to regulate frozen foreign property "by means of * * * licenses, or otherwise"

[18] In § 1-102(a) of Executive Order No. 12279 (46 Fed. Reg. 7919 (1981) (Pet. App. 44), for example, the President revoked and withdrew "[a]ll licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order, attachment, or otherwise, including the license contained in [31 C.F.R. 535.504], with respect to [Iranian financial assets held by banking institutions]." See also Executive Order No. 12280, § 1-102(a) (46 Fed. Reg. 7921 (1981)) (Pet. App. 47); Executive Order No. 12281, § 1-102(a) (46 Fed. Reg. 7923 (1981) (Pet. App. 50).

(50 U.S.C. (Supp. III) 1702(a)(1)), and the President's revocation of the license he issued permitting pre-judgment restraints upon Iranian assets is an action that falls within the plain language of * * * IEEPA." *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, No. 80-1779 (D.C. Cir. June 5, 1981), slip op. 18-19; see also *id.* at 22 n.10. Indeed, the ability to modify or revoke authorizations or licenses affecting frozen assets is essential in order to give the President the flexibility necessary to deal with the "unusual and extraordinary threat * * * to the national security, foreign policy, or economy of the United States" that occasioned the blocking order in the first place. See 50 U.S.C. (Supp. III) 1701(a). Thus, when the President revoked all licenses and authorizations for acquiring or exercising any right, power or privilege in Iranian property under an order of attachment or other judicial process, all pre-judgment attachments of Iranian assets obtained after the November 14, 1979, blocking order were rendered "null and void." 35 C.F.R. 535.203(a) (1980).

Furthermore, in the Executive Orders issued on January 19, 1981, the President did more than revoke the general license for the pre-judgment attachments themselves; he provided as well that "[a]ll rights, powers, and privileges" relating to Iranian properties that *derive* from such attachments and other orders in litigation issued on or after November 14, 1979, are "nullified" and that "all persons claiming any such right, power, or privilege are hereafter barred from exercising the same" (see, *e.g.*, Executive Order No. 12279, § 1-102(b) (46 Fed. Reg. 7919 (1981)) (Pet. App. 44)). This aspect of the orders is within the terms of IEEPA that authorize the President to "*nullify*, void, prevent or prohibit * * * *exercising* any right, power, or privilege" with respect to any property in which a foreign country has an interest (50 U.S.C. (Supp. III) 1702(a)(1)(B)) (emphasis added). See *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 9; *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, *supra*, slip op.

19; *Unidyne Corp.* v. *Government of Iran*, Civil Action No. 80-1029-A (E.D. Va. Mar. 30, 1981), at 4-5.

Thus, by virtue of the Executive Orders issued on January 19, 1981, the legal basis for the attachments petitioner obtained against property of the Iranian bank defendants has been revoked; whatever rights, powers, and privileges petitioner might have acquired relating to the attached property have been nullified; and petitioner is prohibited from exercising any such rights, powers and privileges.[19] As a result—and quite aside from the fact

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[19] Many pre-judgment attachments of property of Iran and Iranian entities were invalid in any event. The Foreign Sovereign Immunities Act, 28 U.S.C. 1609, 1610(d), in general bars pre-judgment attachments because they are "foreign relations irritants." 122 Cong. Rec. 33532 (1976) (remarks of Rep. Danielson). See *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 13 n.12. The FSIA does keep in force, however, provisions of pre-existing international agreements, including Article XI, ¶ 4 of the 1955 Iran-United States Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, 8 U.S.T. 899, 909 T.I.A.S. No. 3853. 28 U.S.C. 1609. See *Behring Int'l, Inc.* v. *Imperial Iranian Air Force*, 475 F. Supp. 383, 391-395 (D. N.J. 1979); *New England Merchants National Bank* v. *Iran Power Generation And Transmission Co.*, 502 F. Supp. 120, 124-127 (S.D.N.Y. 1980), remanded, Nos. 740, 1099-1144, 1145-1224, 1225-1227 (2d Cir. Apr. 9, 1981), on remand, *Marschalk Co.* v. *Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981); *E-Systems, Inc.* v. *Islamic Republic of Iran*, 491 F. Supp. 1294, 1299-1302 (N.D. Tex. 1980). Hence, if a foreign nation by agreement has waived its immunity from pre-judgment attachments, the FSIA does not alter that situation.

Like numerous other such treaties, the Iran-United States Treaty of Amity waives immunity only for a commercial or business "enterprise * * * which is publicly owned or controlled," but not for any other type of government agency. See, *e.g.*, S. Exec. Rep. No. 5, 83d Cong., 1st Sess. 5 (1953); S. Exec. Rep. No. 5, 81st Cong., 2d Sess. 6 (1950); and cf. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 27 (1976). The waiver of immunity in the Treaty therefore would apply to a state-owned tourist hotel, for example, but not to the Army. At a minimum, then, all current prejudgment attachments of Iranian assets are invalid under the FSIA and the Treaty except for those attachments of assets owned by government-

that those attachments did not prevent a transfer by the *President* in any event (see pages 28-31, 33-36, *infra*)—the orders of attachment issued by the District Court for the Central District of California do not prohibit the President from requiring the transfer of property subject to the attachments. Nor do they excuse persons holding that property from complying with the President's instructions. Similarly, the writs of garnishment and execution issued by the Washington state courts do not stand as an obstacle to the transfer of the affected property in that State. Those writs were obtained by petitioner after January 19, 1981, when the President revoked the general authorization for judicial proceedings with respect to blocked Iranian property.[20]

B. The President's Actions Significantly Further The Historical Purposes Of Presidential Orders Blocking Foreign Assets

The congressional purpose in authorizing blocking orders is "to put control of foreign assets in the hands

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controlled *business* enterprises. Even as to business enterprises, the district courts in *New England Merchants* and *E-Systems, Inc.*, concluded that Iran had not waived its immunity from pre-judgment attachments (502 F. Supp. at 125-127; 491 F. Supp. at 1299-1302; contra, *Behring Int'l, Inc.* v. *Imperial Iranian Air Force, supra*, 475 F. Supp. at 392-395.

This issue is developed in detail in the United States' amicus curiae brief in *Electronic Data Systems Corp.* v. *Social Security Organization of Iran*, 610 F.2d 94 (2d Cir. 1979). For the convenience of the Court, we are lodging a copy of our Second Circuit brief in the *EDS* case with the Clerk. There is, however, no need for the Court to reach the immunity question here, because petitioner's attachments were obtained pursuant to the revocable license issued by the Treasury following the President's blocking order, at a time when "the assets were within the President's control, under the umbrella of his IEEPA powers." *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority, supra*, at 10.

[20] In any event, that general authorization never extended to the *enforcement* of a judgment with regard to Iranian property (see 31 C.F.R. 535.504(b)(2), 46 Fed. Reg. 14336 (Feb. 26, 1981)), which would have required a specific license.

of the President." *Propper* v. *Clark*, 337 U.S. 472, 493 (1949).[21] Such an order bars all subsequent transfers of, restraints on, or transactions affecting that property without the approval of the President. See, *e.g.*, *Orvis* v. *Brownell*, 345 U.S. 183, 187-188 (1953); *Zittman* v. *McGrath*, 341 U.S. 446, 448, 463-464 (1951); *Lyon* v. *Singer*, 339 U.S. 841, 842-843 (1950); *Propper* v. *Clark*, *supra*, 337 U.S. at 486; *Sardino* v. *Federal Reserve Bank of New York*, 361 F.2d 106, 112-113 (2d Cir. 1966). This permits the President to maintain the foreign assets at his disposal, unfettered to the degree he deems advisable, for use in negotiating a resolution of the national emergency that gave rise to the blocking order. See, *e.g.*, *Zittman* v. *McGrath*, *supra*, 341 U.S. at 454; *Richardson* v. *Simon*, 560 F.2d 500, 505 (2d Cir. 1977), appeal dismissed, 435 U.S. 939 (1978); *Real* v. *Simon*, 510 F.2d 557, 563 (5th Cir. 1975); cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 412 (1964).

In the present case, the initial blocking of Iranian assets after the hostages had been seized and Iran had threatened to withdraw its assets from the country served both as an official response to that hostile action and as a form of economic pressure upon Iran to release the hostages and to resolve the resultant crisis. Given the international conditions that occasioned the blocking order, the subsequent transfer of Iranian assets could be explained simply as a means of obtaining the release of the hostages, easing tensions in the unstable Persian Gulf region, and beginning the process of normalizing relations with Iran—without regard to claims of United States nationals against Iran. That such considerations could alone justify the return of frozen assets in the present case is clear from the language of IEEPA

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[21] *Propper* v. *Clark* and other opinions cited in this portion of the brief concerned blocking orders issued under the Trading with the Enemy Act (TWEA). However, the discussion in these opinions of the purposes of blocking orders is equally applicable here, because IEEPA was patterned after Section 5(b) of the TWEA, 50 U.S.C. app. 5(b). See pages 30-31, *infra*.

itself. IEEPA authorizes the President to exercise the powers it grants in order to deal with any unusual threat, which has its source in whole or substantial part outside the United States, to the "national security, foreign policy, or economy of the United States." 50 U.S.C. (Supp. III) 1701(a)(1). The transfer of Iranian assets in order to obtain the release of the hostages, ease tensions, and restore relations with Iran surely is calculated to meet the threat to the "national security" and "foreign policy" of the United States presented by the circumstances surrounding the hostage crisis.[22]

However, the President's orders freezing Iranian assets and subsequently directing the transfer of those assets also significantly furthered an additional purpose often served by blocking orders: providing for the settlement of claims of United States nationals against the country whose assets were frozen. *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 412, 431; *Zittman* v. *McGrath*, *supra*, 341 U.S. at 454; *Richardson* v. *Simon*, *supra*, 560 F.2d at 505; *Real* v. *Simon*, *supra*, 510 F.2d at 563; *Nielsen* v. *Secretary of the Treasury*, 424 F.2d 833, 840-841 (D.C. Cir. 1970). Congress recognized when it enacted IEEPA that blocking orders are "generally the most effective means of achieving settlement of U.S. claims" (H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 17 (1977); see also *id.* at 6, 12) and, indeed, it made specific provision in IEEPA itself for continuation of freezing controls even after the termination of a national emergency where necessary because of outstanding claims. 50 U.S.C. (Supp. III) 1706(a)(1). See also *Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 before the Subcomm. on International Economic Policy and Trade of the House*

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[22] Thus, even if a claimant is excluded from the arbitral tribunal established by the Agreement with Iran, IEEPA authorizes the return of assets subject to that claimant's attachment. See, *e.g.*, *American Bell Int'l, Inc.* v. *Islamic Republic of Iran*, No. 80-321 (D.D.C. June 11, 1981), petition for cert. before judgment pending, No. 80-2111 (filed June 15, 1981).

Comm. on International Relations, 95th Cong., 1st Sess. 99, 108, 113, 119, 137-138, 147, 182, 213, 217-218, 277-279 (1977) [hereinafter "House IEEPA Hearings"]; *Amending the Trading With the Enemy Act: Hearing on H.R. 7738 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. 6 (1977).

Recognition of a power in the courts, through orders of attachment or otherwise, to prevent a disposition of foreign assets that the President determines to be in the national interest would fly in the face of the congressional purpose of placing complete control of such assets in the President and would substantially diminish the President's stature as the "sole organ of the federal government in the field of international relations" (*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)). In the present case, for example, this would have made most if not all Iranian assets unavailable, for an indefinite period, for use in the resolution of the hostage crisis at the very time when swift and decisive action was compelled. As explained above, however, Congress was aware of these concerns and, by enacting IEEPA, plainly authorized the President to direct the transfer of property against which post-blocking order attachments had been obtained.

C. The President's Actions Are Fully Consistent With Section 5(b) Of The Trading With The Enemy Act, After Which IEEPA Was Patterned

1. *Interpretations Of Section 5(b) Of The TWEA Support The President's Actions Under IEEPA*

As petitioner concedes (Pet. 21), the operative provision of IEEPA, 50 U.S.C. (Supp. III) 1702(a)(1), is drawn directly from and "basically parallels" Section 5(b)(1) of the Trading with the Enemy Act (TWEA), 50 U.S.C. app. 5(b)(1). See H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 14-15 (1977). Therefore, with certain limitations not directly pertinent here, the President

has the same broad blocking powers under IEEPA that he had under the TWEA.[23]

When Congress incorporates provisions of a prior law in this fashion, it may be presumed to have intended that interpretations of the prior law would apply to the new one as well. *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). This intention is particularly evident here, in view of the House and Senate Committees' exhaustive study of Section 5(b) of the TWEA. See H.R. Rep. No. 95-459, *supra*, at 2-9; S. Rep. No. 95-466, 95th Cong., 1st Sess. 1 (1977).

The incorporation in IEEPA of the provisions of Section 5(b) of the TWEA is significant for two reasons. First, the Iranian Assets Control Regulations were pat-

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[23] *See also Revision of Trading With the Enemy Act, Markup Before the House Comm. on International Relations*, 95th Cong., 1st Sess. 4 (Comm. Print 1977). Congress did impose certain limitations on the President's power under IEEPA that were not included in Section 5(b) of the TWEA. Thus, under IEEPA, the President may not "vest" foreign property—*i.e.*, place ownership in the United States—as he could under the TWEA, nor may he seize records or regulate purely domestic transactions. See S. Rep. No. 95-466, 95th Cong., 1st Sess. 5 (1977); H.R. Rep. No. 95-459, *supra*, at 3-5, 10-11, 15 & n. 23. See also 50 U.S.C. (Supp. III) 1702(b)(1) and (2) (barring regulation of non-economic aspects of international relations). The Act also imposes procedural requirements on the exercise of the powers it confers, including a requirement of reports to Congress (50 U.S.C. (Supp. III) 1703(b)) and a tailoring of the powers exercised to the threat posed (50 U.S.C. (Supp. III) 1701(b)). None of these changes, however, narrowed the President's basic authority to block foreign property and license transactions affecting it where, as here, the declared emergency relates precisely to the nation whose assets are blocked. Petitioner's suggestion (Pet. 13, 21-24) that, for present purposes, the President's powers under IEEPA with respect to Iranian property are more limited than those under Section 5(b) of the TWEA is therefore wholly without merit. So, too, is the same suggestion by the district court in *Marschalk* v. *Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981), at 69-70. Indeed, the selectivity Congress exhibited in modifying certain provisions of Section 5(b) of the TWEA when it enacted IEEPA underscores Congress' intention to incorporate intact the substantive provisions of Section 5(b) that were not altered. *Lorillard* v. *Pons*, 434 U.S. 575, 582 (1978).

terned after the assets control regulations issued under Section 5(b) of the TWEA, for property of the People's Republic of China, North Korea, Vietnam, Cambodia and Cuba, that were in effect when IEEPA was enacted. Indeed, the provisions of the Iranian regulations providing that any attachment or other judicial process is "null and void" unless authorized by the Secretary, providing a general license for judicial proceedings (short of judgment and execution) with respect to Iranian property, and providing that all licenses and authorizations are revocable at any time are virtually identical to parallel provisions in the regulations in effect under the TWEA when IEEPA was enacted. See 31 C.F.R. 500.203(e), 500.504, 500.805, 515.203(e), 515.504, and 515.805 (1976).

The reports of the House and Senate Committees that considered IEEPA discuss the assets control regulations then applicable to the People's Republic of China, North Korea, Vietnam, Cambodia, and Cuba. H.R. Rep. No. 95-459, *supra*, at 6 & nn.17-21; S. Rep. No. 95-466, *supra*, at 3. See also *House IEEPA Hearings*, *supra*, at 99, 108, 147, 223, 230, 233.[24] Thus, when Congress incorporated into IEEPA the asset control authority under Section 5(b) of the TWEA, it must be held to have granted the President the same broad authority that theretofore had been exercised in the regulations under the TWEA—including the power to bar attachments and

[24] See also Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 2d Sess., *Trading With the Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency* 557 *et seq.* (Comm. Print 1976) (reproducing these regulations in a collection of documents compiled in connection with the Subcommittee's "thorough review" (*id.* at iii) of Section 5(b) of the TWEA). Although the Committees expressed some reservation about whether certain restrictions on economic transactions with some of these countries were warranted under existing international conditions (see, *e.g.*, Rep. No. 95-459, *supra*, at 9-10), they did not question the scope of the President's power with respect to blocked property, as reflected in the assets control regulations, where the President's powers were properly invoked.

other judicial process affecting the frozen property and, if the President so elects, to issue revocable licenses permitting attachments and other judicial process.

The fact that Congress sculpted IEEPA out of Section 5(b) of the TWEA is also significant because of the decisions of this Court confirming the President's broad authority under Section 5(b) with respect to frozen property against which orders of attachment or similar judicial process had been entered. The Court's decision in *Propper* v. *Clark*, *supra*, 337 U.S. at 482-486, for example, establishes that a license from the Executive is required before a judicial order may effect a transfer of or create a legally enforceable interest in frozen assets.[25] See also *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 9-10.

Similarly, in *Orvis* v. *Brownell*, 345 U.S. 183 (1953), the Court made clear that, although the freezing program in effect during World War II recognized attachment liens insofar as they determined relationships between the creditor and the foreign debtor (see *Zittman* v. *McGrath*, 341 U.S. 446 (1951)), "it did not permit the transfer of a property interest in the blocked funds which could be asserted against the [Alien Property] Custodian" (345 U.S. at 187). This was so because, under the freezing program, an attachment obtained in litigation be-

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[25] As the Second Circuit stated in *Propper*:

> [T]he judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property.
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> There is no cogent reason for excepting transfers by judicial process. To allow the exception would be to furnish a means of evasion by which the impact of freezing controls could be avoided by recourse to judicial proceedings.
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> * * * * *
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> [T]he prohibition of unlicensed transfers * * * is universal.

Clark v. *Propper*, 169 F.2d 324, 327 (2d Cir. 1948), aff'd, 337 U.S. 472 (1949). See also *Chase Manhattan Bank* v. *United China Syndicate, Ltd.*, 180 F. Supp. 848 (S.D.N.Y. 1960).

tween the claimant and foreign national [26] did not create a right or privilege in the blocked property greater than that which the owner of the property could confer by voluntary transfer without first obtaining a specific license from the federal government.[27] The Court observed (*ibid.*):

> Realistically, these reservations deprive the assent [to attachments] of much substance; but that should have been apparent on its face to those who chose to litigate. The opportunity to settle their accounts with the enemy debtor was all that the permission to attach granted.

This accommodation of the interests of the claimants was necessarily limited because "'the Federal Government must have its hands unfettered in using freezing control'" (*Zittman* v. *McGrath*, *supra*, 341 U.S. at 456, quoting the government's brief amicus curiae in *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N.Y. 332, 43 N.E. 2d 345 (1942)).[28]

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[26] Some assent to attachment was thought to be necessary for litigation to proceed, because the foreign debtor was rarely amenable to personal service and any action therefore had to be in the nature of a *quasi in rem* proceeding preceded by an attachment of the property within the jurisdiction of the court. *Zittman* v. *McGrath*, *supra*, 341 U.S. at 457. The post-blocking order attachments and other restraints imposed on Iranian assets are of no jurisdictional significance in the pending Iranian cases, however, because 28 U.S.C. 1330(a) provides for jurisdiction only of *in personam* actions against foreign states. *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, *supra*, slip op. 21-22; see also 28 U.S.C. 1609 and 1610(d)(2).

[27] See, *e.g.*, *Propper* v. *Clark*, *supra*, 337 U.S. at 485; *Zittman* v. *McGrath*, *supra*, 341 U.S. at 454.

[28] The attempt by the district court in *Marschalk Co.* v. *Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981) to distinguish *Orvis* (at 71-72) therefore is unavailing. In *Orvis*, as under the Iranian regulations, consent was given for pre-judgment attachments *only* for purposes of litigation between the claimant and the foreign debtor. Under neither set of regulations did the Secretary consent to a "transfer" of frozen

These same principles apply under the Iranian assets program. Under the Iranian regulations, the transfer of or creation of a legally enforceable interest in frozen property pursuant to court order treated in the same manner as a voluntary transfer by Iran (see pages 15-16, *supra*)—as indeed it must be if the President is to have the flexibility he requires to direct the transfer of frozen Iranian assets as the national interest requires. Thus, a post-blocking order of attachment of Iranian assets was only an attachment of Iran's *contingent* power (*i.e.*, contingent upon the Secretary's authorization) to transfer its interest in the property to the claimant. Because the claimant could obtain no greater rights with respect to the property than Iran itself retained, the attachment gave the claimant an interest in the property that likewise was contingent upon the Secretary's subsequent licensing of a transfer of the property. *Zittman* v. *McGrath*, *supra*, 341 U.S. at 455. " 'The value of such an interest is of course problematical. Whether it is worthless or worth full value will depend upon whether the transfer sought is in accordance with the Government's policies in administering freezing control' " (*Zittman* v. *McGrath*, *supra*, 341 U.S. at 456, quoting the government's brief amicus curiae in *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, *supra*).

It is clear, then, that an attachment giving a claimant an interest in blocked Iranian property that was contingent upon and subordinate to the exercise of the President's paramount and plenary powers under IEEPA to license or direct the property in the manner he believes will best deal with the threat that gave rise to the national emergency did not and could not restrain the President in the exercise of those powers, absent express consent by the President. *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, *supra*, slip op. 20, 22. No such

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property—*i.e.*, creation of an interest in alien property—that could be asserted against the federal government.

consent was given here, and it would have been inconsistent with the purposes of the freezing program to give consent. Accordingly, even if the President had not revoked licenses for pre-judgment attachments and barred claimants from exercising rights under them (see pages 24-27, *supra*), the post-blocking orders of attachment would not have barred the President from ordering the transfer of attached Iranian property in the national interest pursuant to the powers he reserved under IEEPA. *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, *supra*, slip op. 20, 22; *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 11-12.[29]

2. *Sections 9(a) and 34 of the TWEA Do Not Suggest That The President Cannot Order The Transfer Of Frozen Assets*

Despite the broad powers granted to the President under Section 5(b) of the TWEA, petitioner argues (Pet. 22-24) that the President would be barred under the TWEA from returning foreign assets rather than satisfying the claims of United States nationals, because claimants are entitled to file claims with the Executive under Sections 9(a) and 34 of the TWEA and to have their claims paid out of assets held by the Executive. Accordingly, petitioner argues, IEEPA cannot be thought

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[29] Because petitioner's attachments and writs of garnishment and execution were obtained, at most, were revocable and were, in any event, contingent upon and subordinate to the President's exercise of his plenary powers over the alien property under IEEPA, no taking of a property interest occurred when the President exercised his reserved power to revoke the licenses and to direct the transfer of the assets. See *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 12-13; *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, *supra*, slip op. 39-40; see also *United States* v. *Fuller*, 409 U.S. 488 (1973); *Bridge Co.* v. *United States*, 105 U.S. 470, 481-482 (1882); *Acton* v. *United States*, 401 F.2d 896 (9th Cir. 1968), cert. denied, 393 U.S. 1121 (1969).

to authorize the President to return frozen assets to a foreign country rather than satisfying the claims of domestic claimants. This argument reflects a serious misunderstanding of the structure and history of the TWEA.

Section 9(a) of the TWEA permitted a person who was not an enemy alien and who claimed that an enemy owed him a debt to apply to the Alien Property Custodian for satisfaction of that debt from assets vested in the Custodian. If the Custodian denied the claim, the claimant could bring suit in district court to recover. In *Markhan* v. *Cabell*, 326 U.S. 404, 409-410 (1945), this Court held that a person could file a claim under Section 9(a) to recover on a debt where the assets had been vested in the Custodian. But the Court emphasized that, where foreign assets were only *blocked* or *frozen*, as in the case of Iranian property, if the Secretary "refuses a license permitting payment of creditors out of blocked funds, neither the creditor nor the owner has any remedy as a matter of right under the Act" (326 U.S. at 410). See also *Logan* v. *Secretary of State*, 553 F.2d 107 (D.C. Cir. 1976). Thus, *Markham* further reinforces the conclusion that the President may direct the transfer of Iranian assets despite the claims of United States nationals.

Moreover, after *Markham* was decided, Congress added Section 34 to the TWEA (50 U.S.C. App. 34) to provide that debt claims thereafter could be satisfied out of vested assets only on the basis of an equitable distribution to *all* claimants, rather than on a first-come-first-served basis under Section 9(a). Act of Aug. 8, 1946, ch. 878, Section 1, 60 Stat. 925; see *Honda* v. *Clark*, 386 U.S. 484, 487, 495-496 (1967). Section 34(i) of the TWEA now provides that the filing of a claim under Section 34 is the exclusive remedy for satisfaction of a debt; claims and suits on debts under Section 9(a) are barred. S. Rep. No. 1839, 79th Cong., 2d Sess. 9 (1946);

H.R. Rep. No. 2398, 79th Cong., 2d Sess. 15 (1946).[30] Reference to the now-superseded provision for satisfaction of debt claims under Section 9(a) therefore lends no support to petitioner's position.

Claimants can, of course, recover on a debt owed by enemy aliens under Section 34 of the TWEA, but only where foreign property has been *vested* in the United States. The power to vest foreign property was deliberately withheld from the President under IEEPA. IEEPA therefore furnishes no *right*, comparable to that in Section 34 of TWEA with respect to vested assets, to assert a claim against frozen assets. See *Markham* v. *Cabell*, *supra*. In addition, petitioner does not seek through its attachments and writs of execution and garnishment to participate on a pro rata or other equitable basis in Iranian assets frozen in this country, in a manner analogous to that permitted under Section 34. It instead asserts a priority claim to be satisfied in full out of the assets against which judicial orders have been entered, in derogation of the rights of other claimants who have not yet filed suit or obtained similar judicial orders or who might submit their claims to the Iran-United States Claims Tribunal. The settlement arrangement negotiated by the President, on the other hand, provides for full satisfaction of all claims that are found by the Tribunal to be within its jurisdiction and meritorious.

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[30] Section 9(a) remains available for the filing of claims seeking the *return* of vested property in which a non-enemy alien claims an interest.

II. THE PRESIDENT VALIDLY EXERCISED HIS AUTHORITY TO SETTLE CLAIMS OF UNITED STATES NATIONALS AGAINST A FOREIGN COUNTRY BY PROVIDING FOR THE PRESENTATION OF SUCH CLAIMS TO THE IRAN-UNITED STATES CLAIMS TRIBUNAL ESTABLISHED UNDER THE AGREEMENT WITH IRAN

The President possesses and has long exercised the authority under the Constitution to settle the claims of American nationals against a foreign country. The Executive power to settle claims has been recognized and approved by Congress and the courts and has not been divested by any action of Congress. To the contrary, with respect to the Agreement with Iran, the President's constitutional authority to settle claims through arbitration is reinforced by treaty and statute.

As implemented by Executive Order and regulations, the provision in the Agreement with Iran for the submission of claims to binding arbitration fashions a new rule of substantive law that domestic courts are required to apply to cases pending before them by staying further litigation of claims that may be presented to the arbitral tribunal. Accordingly, the district court correctly denied petitioner's motion for a preliminary injunction seeking to prevent implementation of Executive Order No. 12294, which suspended the domestic effect of claims against Iran that may be presented to the Iran-United States Claims Tribunal, and correctly dismissed the complaint for failure to state a claim upon which relief could be granted.

A. The President Acted Within His Authority In Providing For Settlement Of Claims Of United States Nationals Against Iran

1. *The President's Constitutional Power To Settle Claims Has Been Uniformly Recognized By All Three Branches Of Government*

Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. *United States* v. *Pink*, 315 U.S. 203, 225 (1942). Depending on the circumstances, this friction may range from a minor irritant in the course of otherwise amicable dealings to a serious "impediment to resumption of friendly relations" (*ibid.*)—or, indeed, to any relations at all. To resolve these difficulties, nations have frequently entered into agreements settling the claims of their respective nationals. So entrenched is this experience that, as the First Circuit observed, "[i]nternational agreements settling claims by nationals of one state against the government of another 'are established international practice reflecting traditional international theory.'" *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 16, quoting L. Henkin, *Foreign Affairs and the Constitution* 262 (1972). See also *Ozanic* v. *United States*, 188 F.2d 228, 231 (2d Cir. 1951) (L. Hand, J.); see generally R. Lillich & B. Weston, *International Claims: Their Settlement by Lump-Sum Agreements*, 2 Vols. (1975).

As a sovereign, the United States requires, and possesses, the power to deal with other nations as an equal. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). Consistent with this principle and the established international practice referred to above, the United States repeatedly has exercised its sovereign authority to settle the claims of its nationals against other countries—even, occasionally, by renouncing those

claims.[31] Sometimes this has been done by treaty. See, *e.g.*, *United States ex rel. Boynton* v. *Blaine*, 139 U.S. 306 (1891). But as the District of Columbia Circuit concluded, there has also been "a long-standing practice of settling private American claims against foreign governments through executive agreements." *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, *supra*, slip op. 28; see also *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 16-19.[32]

Congress has acknowledged this long-standing practice of settlement of claims by Executive Agreement[33] and

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[31] As early as 1800, the United States, in exchange for release from a treaty obligation to come to the aid of France, renounced the claims of American nationals arising from French seizure of their vessels. See *Blagge* v. *Balch*, 162 U.S. 439 (1896); *Gray* v. *United States*, 21 Ct. Cl. 340 (1886).

[32] At least since the case of the "Wilmington Packet" in 1799, Presidents have exercised the power to settle claims of United States nationals by Executive Agreement. Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement*, 69 Am. J. Int'l L. 837, 844 (1975). That case "set a precedent which was to be followed in a long line of subsequent claims, settlement of which has been sought by the authority of the Executive alone" (W. McClure, *International Executive Agreements* 44 (1941)). In fact, during the period 1817-1917, "no fewer than eighty executive agreements were entered into by the United States looking toward the liquidation of claims of its citizens * * *" (*id.* at 53). See also 14 M. Whiteman, *Digest of International Law* 247 (1970); 2 C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 1409 (2d rev. ed. 1945); 5 G. Hackworth, *Digest of International Law* 403 (1943); 12 M. Whiteman, *Digest of International Law* 1267 (1971); Foster, *The Treaty-Making Power Under the Constitution*, 11 Yale L.J. 69 (1901); McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L.J. 181, 268 (1945).

[33] See, *e.g.*, 79 Cong. Rec. 969-971 (1935) (listing 40 Executive Agreements); 109 Cong. Rec. 21591-21595, 25148-25149 (1963) (debate on proposals, which were never enacted, to express the sense of Congress that settlement agreements be submitted to the

has approved and facilitated the implementation of such settlements on a number of occasions. For example, in 22 U.S.C. 1623(a)[34] Congress conferred jurisdiction on the International Claims Commission[35] to determine claims of nationals of the United States "included within the terms of any claims agreement * * * concluded between the Government of the United States and a foreign government * * * providing for the settlement and discharge of claims * * * of nationals of the United States against a foreign government, arising out of the nationalization or other taking of property, by the agreement of the Government of the United States to accept from that government a sum in en bloc settlement thereof." See also 31 U.S.C. 547; 22 U.S.C. 1643-1643k; 1644-1644m.

Congress also recognized the President's claims-settlement authority in 1977 when it enacted IEEPA, which enables the President to freeze foreign assets in order to use them as negotiating leverage for the settlement of claims. See 50 U.S.C. (Supp. III) 1706(a)(1); pages 29-30, *supra*. Such congressional recognition also is manifest from recent legislation establishing or amending programs for claims against the German Democratic Republic, the People's Republic of China (PRC), and Vietnam, which are premised on claims settlement agreements

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Senate for its advice and consent). In one instance, Congress enacted legislation (Trade Act of 1974, 19 U.S.C. 2438) to force the Executive to renegotiate a particular settlement agreement with Czechoslovakia. See Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Agreement*, 69 Am. J. Int'l L. 837, 839-844 (1975); see also Act of Aug. 2, 1977, Pub. L. No. 95-86, Section 708, 91 Stat. 444 (claims against Cuba). Congress has therefore demonstrated its ability to intervene in the Executive's claims-settlement process, but it has rarely done so.

[34] This provision was enacted in 1950. Act of Mar. 10, 1950, ch. 54, Section 4, 64 Stat. 13.

[35] Now the Foreign Claims Settlement Commission. See Reorg. Plan No. 1 of 1954, 68 Stat. 1279.

negotiated or to be negotiated by the Executive. See pages 61-64, *infra*. And most recently, with respect to the Iranian Agreement itself, the Senate Committee on Foreign Relations expressed the view that the Iran-United States Claims Tribunal established by the Agreement "is of vital importance to the United States" and "urge[d] the Department [of State] to devote sufficient personnel and resources to enable the United States to represent the interests of U.S. citizens before the tribunal in an effective and expeditious manner" (S. Rep. No. 97-71, 97th Cong., 1st Sess. 5 (1981)). Thus, Presidential claims settlement represents "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, * * * making as it were such exercise of power part of the structure of our government." *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 610-611 (Frankfurter, J., concurring).

This Court, too, has confirmed the President's claims-settlement authority, most fully in *United States* v. *Pink*, 315 U.S. 203 (1942).[36] There, the Court upheld the validity of the Litvinov Assignment, which was part of an Executive Agreement accomplished through the exchange of diplomatic notes. Under the Agreement, the Soviet Union assigned to the United States amounts owed to it by American nationals, including assets of United States branches of Russian companies that had been nationalized by the Soviet Government. These assigned funds were then to be used to pay the outstanding claims of American nationals against Russia. The Court

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[36] The Court's awareness in *Pink* of the established precedent for the settlement of claims by the Executive is evidenced by its citation (315 U.S. at 230) to Moore, *Treaties and Executive Agreements*, 20 Pol. Sci. Q. 385, 403-417 (1905) (reprinted at 62 Cong. Rec. 13063-13068 (1922)), which discusses the precedents at length. See also *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 431; *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U.S. 470, 480 (1941).

recognized that the non-payment of these claims had for years been one of the barriers to recognition of the Soviet regime by the Executive, and concluded that the "[p]ower to remove such obstacles to full recognition as settlement of claims of our nationals * * * certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations' " (315 U.S. at 229, quoting *United States* v. *Curtiss-Wright Export Corp.*, *supra*, 299 U.S. at 320). The Court explained (315 U.S. at 229-230) that

> [e]ffectiveness in handling the delicate problems of foreign relations requires no less. Unless such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs * * * is to be drastically revised. It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent. We would usurp the executive function if we held that that decision was not final and conclusive in the courts.

Given the concurrence of the three Branches of government on this question of Executive authority, "[t]hat the President's control of foreign relations includes the settlement of claims is indisputable" (*id.* at 240) (Frankfurter, J., concurring).

2. *The President Validly Exercised His Claims Settlement Authority In This Case*

a. The considerations of Executive flexibility and diplomatic delicacy that formed a part of the background for the Litvinov Assignment were present as well in the period preceding the Agreement with Iran, but with far

greater force and urgency. Here, as in *Pink*, the President's settlement of claims "was not an isolated event but a necessary incident to the resolution of a dispute between our nation and another." *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 22. Indeed, as the First Circuit observed, "[t]his case well illustrates the imperative need to preserve a presidential flexibility sufficient to diffuse an international crisis, in order to prevent the crisis from escalating or even leading to war" (*id.* at 19).[37] In this respect, the Agreement with Iran properly serves the foreign policy and national security of the United States as a whole, as well as the interests of United States claimants generally. See *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 431; *United States* v. *Pink*, *supra*, 315 U.S. at 227.[38] And here, as in *Pink*, the President's determination, in the overall context of the Iranian crisis, about which claims to settle and the manner in which settlement would be achieved is "final and conclusive in the courts" (315 U.S. at 230).

b. Typically, the Executive has utilized several methods to settle claims. First, in direct negotiations with the other country, the Executive has espoused multiple American claims arising out of specific events or covering a specific period of time. Often it has accepted

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[37] Although the Iranian crisis presented a particularly compelling occasion for the exercise of the President's authority to settle claims, that authority has been recognized as well where the United States has friendly relations with the other nation, in order to maintain "continued mutual amity between [this] nation and other powers." *Ozanic* v. *United States*, 188 F.2d 228, 231 (2d Cir. 1951). See *Ex parte Peru*, 318 U.S. 578, 587 (1943); *United States* v. *Pink*, *supra*, 315 U.S. at 240 (Frankfurter, J., concurring).

[38] See also 2 C. Hyde, *supra* note 32, at 890-891; 12 M. Whiteman, *supra* note 32, at 1217, 1224; William A. Parker *(United States* v. *Mexico)*, *Opinions of Commissioners under the Convention Concluded September 8, 1923 between the United States and Mexico* 35, 36 (1927); 6 J. Moore, *A Digest of International Law* 1026-1027 (1906).

a lump sum payment in full settlement of aggregated claims, without agreeing with the other country as to the value of each individual claim.[39] In other settlements there has been some agreement on the amount payable for each individual claim or category of claims. The Iranian Agreement, with respect to payments to banking syndicates, falls into this category. See page 7 & note 8, *supra*.

A third method employed by the Executive in settling claims of United States nationals has been to provide for their submission to international arbitration by a claims commission.[40] Throughout our history, many claims of

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[39] For example, in the recent United States-People's Republic of China Settlement, May 11, 1979, T.I.A.S. No. 9306, the United States agreed to accept $80.5 million in full settlement of certain claims of American nationals against the PRC. Numerous other substantial lump sum agreements, providing for the full settlement of categories of individual claims, have also been concluded, particularly during the period since the Second World War. See, *e.g.*, United States-Egypt Claims Settlement through Exchange of Notes, May 19, 1979, T.I.A.S. No. 9589; United States-Hungary Claims Settlement, Mar. 6, 1973, 24 U.S.T. 522, T.I.A.S. No. 7569; United States-Bulgaria Claims Settlement, July 2, 1963, 14 U.S.T. 969, T.I.A.S. No. 5387; United States-Poland Claims Settlement, July 16, 1960, 11 U.S.T. 1953, T.I.A.S. No. 4545; United States-Rumania Claims Settlement, Mar. 30, 1960, 11 U.S.T. 317, T.I.A.S. No. 4451; United States-Yugoslavia Claims Settlement, July 19, 1948, 12 Bevans 1277, T.I.A.S. No. 1803. See generally R. Lillich & B. Weston, *International Claims: Their Settlement by Lump-Sum Agreements*, 2 Vols. (1975).

[40] This Court often has had occasion to consider the use of arbitration as an accepted method for the settlement of international claims. For example, commissions to resolve outstanding claims were established by Treaty with the United Kingdom, May 8, 1871, 12 Bevans 170, T.S. No. 133 (see, *e.g.*, *Williams* v. *Heard*, 140 U.S. 529 (1891); *United States* v. *Weld*, 127 U.S. 51 (1888)); by Agreement with Spain, Feb. 11-12, 1871, 11 Bevans 540, T.S. No. 328-1 (see, *e.g.*, *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251 (1888)); and by Treaty with Mexico, July 4, 1868, 9 Bevans 826, T.S. No. 212, and Apr. 11, 1839, 9 Bevans 783, T.S. No. 205 (see, *e.g.*, *United States ex. rel. Boynton* v. *Blaine*, 139 U.S. 306 (1891); *Peugh* v. *Porter*, 112 U.S. 737 (1885);

United States nationals have been remitted to arbitration by Executive Agreement.[41] Thus, the provision in the Iranian Agreement for arbitration of claims against Iran is fully consistent with historical practice.[42]

Alling v. *United States*, 114 U.S. 562 (1885); *Williams* v. *Oliver*, 53 U.S. (12 How.) 111 (1851)). See generally A. Stuyt, *Survey of International Arbitrations* 1794-1970 (1972); 3 M. Whiteman, *Damages in International Law* Appendix B (1943); R. Lillich, *International Claims: Their Adjudication by National Commission* 6-7 (1962); J. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (1898).

[41] See 2 C. Hyde, *supra* note 32, at 1409; Moore, *supra* note 36, 20 Pol. Sci. Q. at 403-417); S. Crandall, *Treaties: Their Making and Enforcement* 109-111 (1916); 79 Cong. Rec. 969-971 (1935) (listing 40 Executive Agreements, entered into between 1842 and 1931, providing for arbitration of claims against foreign governments).

[42] Past arbitrations have involved many of the same elements as are present in the arbitration of United States claims against Iran. For instance, past arbitrations have often involved many thousands of claims—over 20,000 were presented to the German-American Mixed Claims Commission established in 1922. See *Final Report of H.H. Martin, Acting Agent of the United States Before the Mixed Claims Commission: United States and Germany* 94 (1941). Furthermore, arbitrations have involved many different kinds of claims: *e.g.*, expropriation, personal injury, war-related damage, and wrongful detention of vessels. In particular, they have included contract claims, such as those involved in this case. It was observed in 1915 that "the Department of State has generally been willing to submit contract claims to the adjudication of international commissions, and these commissions have in general exercised jurisdiction over contract claims as over other claims. * * * Where jurisdiction has been exercised by mixed commissions, as is the general rule, the contract has been examined as would any other instrument open to judicial construction." E. Borchard, *The Diplomatic Protection of Citizens Abroad* 296, 299 (1925) (citing numerous examples). See also 5 G. Hackworth, *supra*, at 618-623; 2 C. Hyde, *supra* note 32, at 998-1004; J. Moore, *supra* note 40, at 3425-3590. Finally, in some arbitrations, claimants themselves have appeared directly before the arbitral tribunal, as many will before the Iran-United States Claims Tribunal. See E. Borchard, *supra*, at 358.

As a practical matter, arbitration may be more advantageous to claimants than the President's acceptance of a lump sum settlement, because it offers the prospect of full recovery if a claim is found to be meritorious. The Agreement with Iran provides for full recovery on such claims (Decl. I, ¶ 7; Decl. II, Art. IV, ¶ 3; Pet. App. 25, 32). In contrast, post-war lump-sum agreements have, on the average, provided less than 50% recovery after the lump-sum payment has been distributed to satisfy all claims found by the Foreign Claims Settlement Commission to be meritorious. See *Status of Claims Settlements with Nonmarket Countries, East German Claims Bill: Hearings on H.R. 14642 Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 2d Sess. 9-12 (1976). Arbitration also has the diplomatic advantage of allowing the two nations to reach general agreement to resolve their differences, while deferring resolution of individual disputes and subsidiary issues to an impartial body. This is particularly beneficial in circumstances, as here, that require immediate resolution.

c. The provisions making arbitration the *exclusive* procedure for resolution of claims subject to the jurisdiction of the Iran-United States Claims Tribunal also are consistent with established principles governing Executive settlements.[43] So, too, is the provision that all arbitration determinations by the Tribunal on the merits, either for or against the claimant, shall be final and binding. Decl. II, Art. IV, ¶ 1 (Pet. App. 32); Executive Order No. 12294, § 4 (Pet. App. 53).

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[43] The Agreement with Iran (Decl. II, Art. I; Pet. App. 30) provides that Iran and the United States will promote settlement of claims subject to the Tribunal's jurisdiction and, failing that, will submit the claims to arbitration by the Tribunal. See also Decl. I, General Principle B (Pet. App. 21-22). Section 1 of Executive Order No. 12294 (Pet. App. 52-53) implements these provisions, and makes arbitration exclusive, by suspending the domestic effect of any claims that may be presented to the Tribunal.

Claims taken up for settlement by the Executive become claims of the United States. See, *e.g.*, *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U.S. 470, 487 (1941); *United States ex rel. Boynton* v. *Blaine*, *supra*, 139 U.S. at 323; *Great Western Ins. Co.* v. *United States*, 19 Ct. Cl. 206, 217-218, aff'd on other grounds, 112 U.S. 193 (1884).[44] Consequently, the Executive fully controls the manner of their presentation,[45] and may make such settlement as it deems appropriate, even without the claimant's consent. 1 M. Whiteman, *Damages in International Law* 275 (1937); *Restatement (Second) of Foreign Relations Law* § 213 (1965); 2 C. Hyde, *supra* note 32, at 890.[46]

It follows that the Executive's authority over claims settlement includes the power to make that settlement the exclusive remedy for satisfaction of the claim involved,[47]

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[44] See also L. Henkin, *Foreign Affairs and the Constitution* 262 (1975); 1 R. Lillich & B. Weston, *supra*, at 1; 6 Moore, *A Digest of International Law* 616 (1906); 1 M. Whiteman, *Damages in International Law* 275 (1937).

[45] The Executive also has unfettered discretion, as it must, concerning whether to espouse a particular claim at all. *Restatement (Second) of Foreign Relations Law* § 212 (1965); *Miller* v. *United States*, 583 F.2d 857, 865 (6th Cir. 1978); *United States* v. *La Abra Silver Mining Co.*, 29 Ct. Cl. 432, 512-513 (1894), aff'd, 175 U.S. 423 (1899). In fact, claims have been espoused even over the objections of the nationals whose claims were involved. See 8 M. Whiteman *Digest of International Law* 1224 (1967); [1973] *Digest of United States Practice in International Law* 332-333.

[46] Individualized consent of each claimant would be difficult if not impossible to obtain in situations involving lump sum settlements covering perhaps thousands of potential claims.

[47] Typically, claims agreements have contained specific provisions stating that the settlement is to provide the exclusive remedy for satisfaction of the claims. Among the lump sum agreements referred to in note 39, *supra*, see, *e.g.*, those with China (Arts. II(a) and V); Egypt (Arts. 3, 4, 6 and 7); Hungary (Arts. 1(1), 6 and 7); Bulgaria (Arts. I(1) and III(2)); Poland (Arts. I(A), IV and V(B)); Rumania (Arts. I(1) and IV); and Yugoslavia (Arts. 1(a) and 9(b)). Among the arbitration agreements referred to in note 40, *supra*, see, *e.g.*, Arts. XI, XIII, and XVIII of the

thereby extinguishing the claim's existence apart from the settlement process. Except as may otherwise be provided in the agreement, each claim becomes merged in the settlement, "estop[ping] the claimant from all right to again demand any redress from the foreign country" (E. Borchard, *supra* note 32, at 368), "terminating any recourse under domestic law" (L. Henkin, *supra*, at 262), and "reliev[ing] the foreign state of further responsibility" with respect to the claim. *Restatement*, *supra*, at § 213, Comment a.[48] Accordingly, the President acted well within his authority in the present case by making arbitration the exclusive remedy for claims within the jurisdiction of the Tribunal and agreeing that the Tribunal's awards would be final and binding. Indeed, the ability of the Executive to negotiate and conclude a satisfactory claims settlement—and thus its ability to conduct the foreign affairs of the United States in accordance with the Constitution—would be effectively undermined if a foreign state could not be assured that a settlement would be respected as the exclusive, final, and binding resolution of the claims.

3. *The President's Authority To Settle Claims Against Iran In The Present Case Is Also Supported By Treaty And Statute*

a. Quite aside from the President's constitutionally-based settlement authority, the 1955 Treaty of Amity,

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Treaty with the United Kingdom; Para. 7 of the Agreement with Spain; Arts. II and V of the 1868 Treaty with Mexico; and Arts. X and XII of the 1839 Treaty with Mexico. On the other hand, some agreements have expressly provided that they do not establish an exclusive remedy for claimants. See, *e.g.*, Art. II(4) of the Arbitration Agreement between the United States and Canada Relating to the Gut Dam, Mar. 25, 1965, 17 U.S.T. 1566, 1569, T.I.A.S. No. 6114.

[48] The courts have long recognized that claims settlements may foreclose all other remedies. See, *e.g.*, *Comegys* v. *Vasse*, 26 U.S. (1 Pet.) 191, 211 (1828); *United States* v. *The Schooner Peggy*, *supra*; *Ozanic* v. *United States*, *supra*; *Meade* v. *United States*, 2 Ct. Cl. 224, 275-276 (1866), aff'd, 76 U.S. (9 Wall.) 691, 725 (1869).

Economic Relations, and Consular Rights Between the United States and Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853, furnishes an independent basis for the Executive Agreement's providing for the submission of claims to arbitration.[49] Article XXI(2) of the Treaty provides for the resolution of disputes with Iran regarding the interpretation or application of the Treaty by submission to the International Court of Justice or "by some other pacific means," as agreed by the parties. Arbitration is, of course, a pacific means of settlement (see, *e.g.*, United Nations Charter, Art. 33(1)), and post-Charter friendship, commerce and navigation treaties generally refer to "pacific means" of settlement in clear contemplation of the means specified in Article 33.

Petitioner's contract claims against Iran, as well as claims of other American commercial claimants, are based on actions by the Government of Iran that clearly implicate provisions of the Treaty. Certain claims, including those based on breach of contract or expropriation, involve allegedly "unreasonable" or "discriminatory" measures taken by Iran against United States nationals and companies that "impair their legally acquired rights and interests," in violation of Article IV(1) of the Treaty. Other claims concern actions by which Iran allegedly failed to accord property of United States nationals and companies "the most constant protection and security" required by Article IV(2). Similarly, expropriation claims involve Iran's obligation to provide "prompt payment of just compensation." Art. IV(2). See also Art. IV(1) (each party shall assure effective enforcement of contract rights); Art. IV(4) (enterprises of nationals and companies are entitled to equal treatment in the conduct of their business).

Once taken up by the United States, claims falling within the terms of the Treaty become claims of the United States, and the dispute therefore becomes one

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[49] See McDougal & Lans, *supra*, 54 Yale L.J. at 205; *Restatement, supra*, at § 119.

"between the High Contracting Parties" (Art. XXI(2)).[50] Because the President is charged with faithfully executing the laws (U.S. Const. Art. II, § 3), including international agreements (*id.* at Art. VI; *United States* v. *Pink*, *supra*, 315 U.S. at 230), and must speak for the United States in the international arena (see, *e.g.*, *United States* v. *Curtiss-Wright Export Corp.*, *supra*, 299 U.S. at 319-329), he determines when and how to invoke the dispute resolution provisions of the Treaty. In the present instance, the President has invoked his authority by agreeing to the establishment of an international arbitration mechanism.

b. Pursuant to 22 U.S.C. 1732, whenever the President is made aware that a foreign government is unjustly holding an American citizen and a demand for his release is refused, "the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release * * *." "The legislative history of the Hostage Act [22 U.S.C. 1732] indicates that it was designed to accord the President a broad discretion to resolve a matter usually regarded as of the utmost urgency—the taking of American nationals as hostages." *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, *supra*, slip op. 2 (separate statement of McGowan, J.).

As a statute that is designed to be used in times of emergency, Section 1732 delegates to the President all powers that bear a "reasonable relation to the particular emergency confronted" (*United States* v. *Yoshida International, Inc.*, 526 F.2d 560, 579 (C.C.P.A. 1975)). And because the statute relates to the conduct of foreign affairs, such a broad delegation of powers is permissible. *United States* v. *Curtiss-Wright Export Corp.*, *supra*,

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[50] Interpreting a similar dispute clause, the Permanent Court of International Justice held that once the claimant's government took up the "dispute" of its national, that dispute "entered upon a new phase; it entered the domain of international law, and became a dispute between two States." *The Mavrommatis Palestine Concessions*, Judgment, P.C.I.J. Series A, No. 2, at 12 (1924).

299 U.S. at 320. Thus, at least where a comprehensive agreement includes as a central element the release of American hostages, Congress may reasonably be held to have affirmatively confirmed in the President alone whatever authority the United States Government, as a sovereign whole, necessarily possesses to deal with other sovereigns for the settlement of mutual claims. See pages 40-41, *supra*.

c. Finally, the President's broad authority under IEEPA supports the President's actions suspending the domestic effect of claims against Iran. When a national emergency has been declared under IEEPA, the President may "regulate, * * * nullify * * *, prevent, or prohibit * * * [the] acquisition * * * of * * * or [the] exercising [of] any right, power, or privilege with respect to * * * any property in which any foreign country * * * has any interest" (50 U.S.C. (Supp. III) 1702(a)(1)(B)). Claims against Iran in American courts represent attempts to acquire or exercise a right with respect to Iranian property, particularly to the extent, as here, that the claimant has obtained a pre-judgment attachment or seeks to execute on a judgment. Pursuant to the President's broad authority under IEEPA, the acquisition or exercising of such a right in foreign property may be regulated, nullified, prevented, or prohibited. See *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra* (Breyer, J., concurring); but see *id.* at 13-14 & n.13 (majority opinion); *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, *supra*, slip op. 26-27 n.15.

4. *The Claims Settlement Agreement Does Not Interfere With The Jurisdiction Of The Courts*

The Agreement with Iran providing for the settlement of claims through arbitration does not infringe upon the jurisdiction or powers of Article III courts, as petitioner suggests (Pet. 12, 15 n.7). The President's long-recognized authority to settle claims of United States nationals is not defeated in a particular instance merely

because the claimant happens to have filed a lawsuit. Such a result would greatly impede the exercise of the President's foreign relations power.

The Agreement with Iran, as implemented by Executive Orders and regulations, has become part of the law of the land (*United States* v. *Pink*, *supra*, 315 U.S. at 230; *United States* v. *Belmont*, 301 U.S. 324, 331-332 (1937)), and as such, domestic courts are obliged to apply the law resulting from the Agreement to pending cases. *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). As the District of Columbia Circuit observed:

> Executive Order 12294, issued by President Reagan on February 24, 1981 ordered "[a]ll claims which may be presented to the . . . Claims Tribunal . . . suspended . . . ." We note that the President did not order the litigation suspended, or the power of the courts to consider the claims suspended. Instead, he acted with respect to the claims only. We read this as an effort to modify not the jurisdiction of the courts, but the substantive rule of law they are to apply. If constitutional, the Executive Order creates the situation in which [claimants], in the words of Fed. R. Civ. P. 12(b)(6), have "fail[ed] to state a claim upon which relief can be granted."

American Int'l Group, Inc. v. *Islamic Republic of Iran*, *supra*, slip op. 23 (footnote omitted); see also *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 16, 24.[51]

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[51] The district court in *Marschalk Co.* v. *Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981), failed to understand this critical distinction in concluding (at 17, 31-34, 45, 51, 56) that the Agreement interferes with the court's jurisdiction.

That court also erred in relying on language in General Principle B of Declaration I, which states that "the United States agrees to *terminate* all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises" (Pet. App. 22; emphasis added). The President has construed and implemented the Agreement in a manner

This conclusion is not altered by the fact that the district court entered judgment against the Government of Iran and AEOI on February 18, 1981—before the issuance of Executive Order No. 12294, which suspended the domestic effect of claims that may be presented to the Tribunal. That judgment was improperly entered.[52] But in any event, petitioner's underlying claim against the defendants as to whom it has obtained a judgment, its claim against the remaining defendants, and its claim on the unpaid judgment pending on appeal in the Ninth Circuit, all are "claims * * * outstanding on [January 19, 1981] * * * and arise out of debts, contracts * * * expropriations or other measures affecting property rights

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that effects only the domestic suspension of the cause of action underlying the lawsuit. Cf. *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961); *Factor* v. *Laubenheimer*, 290 U.S. 276, 295 (1933). He has not purported to direct the courts to order an immediate and final termination of the lawsuit.

[52] The judgment was entered in response to petitioner's motion, filed after the Agreement with Iran had been announced, for a judgment based on AEOI's failure to comply with discovery orders. See page 5 & note 6, *supra*. The Agreement made clear that many claims underlying litigation pending against Iran would be referred to arbitration. The United States requested the district court to stay proceedings pending the present Administration's review of the settlement, which was expected to be, and was, concluded by February 26, 1981. Nevertheless, and with no apparent need for expedition, the court entered the requested judgment. In our view, due respect for a coordinate Branch of government and the Executive's role in the conduct of foreign relations required the district court to stay its hand for the brief time requested. The judgment also appears to have been entered in violation of the Iranian Assets Control Regulations, 31 C.F.R. 535.201, 535.203(e), 535.310, 535.504(b) (1980). In any event, on appeal, the court of appeals will be required to apply the Agreement with Iran, as implemented by Executive Order No. 12294, and order proceedings stayed pending presentation of petitioner's claim to the Tribunal. See *United States* v. *The Schooner Peggy*, *supra*. This Court need not decide these questions, however; the essential point for present purposes is that petitioner cannot litigate further on its claim by seeking to execute on its judgment against the Government of Iran and AEOI or by seeking a judgment against the remaining defendants.

* * *" (see Decl. II, Art. II, ¶ 1; Pet. App. 30). They are, therefore, arbitrable, at least on their face.

Whether or not a claimant has an unsatisfied judgment cannot and does not affect the scope of the President's power to settle claims. See generally *American Int'l Group, Inc.* v. *Islamic Republic of Iran, supra*, slip op. 33-34. Indeed, this Court's decision in *United States* v. *The Schooner Peggy, supra*, is dispositive on this issue. In that case, the government's settlement of a claim occurred after the circuit court had entered judgment for the claimants but before this Court had issued its decision affirming the claims settlement power. The holding of this Court in *Schooner Peggy* has been summarized (and the summary approved by the District of Columbia Circuit) as follows:

> [T]he courts are obligated to apply law (otherwise valid) as they find it at the time of final judgment, including, when a case is on review, the time of the appellate judgment.

P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 316 n.4 (1973), quoted in *American Int'l Group, Inc.* v. *Islamic Republic of Iran, supra*, slip op. 25.

B. The Foreign Sovereign Immunities Act Did Not Implicitly Divest The President Of The Authority To Settle Claims

Despite the firmly rooted practice of claims settlement by Executive Agreement and the compelling reasons for recognizing that power in the President, petitioner argues (Pet. 15 n.7, 17-19) that Congress implicitly divested the President of that authority when it enacted the Foreign Sovereign Immunities Act (FSIA) in 1976. Pub. L. No. 94-583, 90 Stat. 2891. The FSIA establishes a comprehensive statutory scheme delineating the immunity of a foreign sovereign to suit in United States courts. 28 U.S.C. 1602 *et seq.*; see generally *Ruggiero* v. *Compania Peruana de Vapores "Inca Capac Yupanqui,"* 639 F.2d 872 (2d Cir. 1981).

Prior to enactment of the FSIA, a foreign government's immunity to suit was determined on a case-by-case basis. Often when a foreign government wished to assert its immunity to suit, it would request the Department of State to file a formal suggestion of immunity with the court. The courts generally deferred to these suggestions of a foreign sovereign's immunity. See, *e.g.*, *Mexico* v. *Hoffman*, 324 U.S. 30 (1945); *Ex Parte Peru*, *supra*. A principal objective of the FSIA was to vest in the courts the authority to make these immunity determinations, without recourse to the Executive. See *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, *supra*, slip op. 29; *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 20-21; H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7 (1976); S. Rep. No. 94-1310, 94th Cong., 2d Sess. 9 (1976).

Essentially, the FSIA "codified the previously-extant legal principles known as the restrictive theory of sovereign immunity," under which "a foreign sovereign may be sued for its actions that are commercial or otherwise private in nature" (*American Int'l Group, Inc.* v. *Islamic Republic of Iran*, *supra*, slip op. 29). Petitioner argues that because persons who have commercial claims against a foreign sovereign now are not generally barred by principles of sovereign immunity from filing and maintaining suit in United States courts, they no longer require the President's assistance to recover on their claims. Hence, the argument proceeds, there is no longer any need to recognize a power in the President to settle their claims. This argument is seriously flawed in a number of respects.

First, and most fundamentally, the power of the President to settle international claims of United States nationals does not derive from the private interest or consent of individual claimants—although the exercise of that authority in fact does substantially meet the imporant concern of the United States and its nationals in obtaining redress for injuries sustained at the hands of a foreign government. Rather, the claims settlement au-

thority derives directly from the Constitution, as a necessary incident to the Executive's plenary authority to conduct the Nation's foreign relations. *United States* v. *Pink*, *supra*, 315 U.S. at 229-230. This constitutionally-based power does not expand or contract depending upon the availability of private remedies to individual claimants. The Court recognized in *Pink* that the President's ability to administer the Nation's foreign policy might be thwarted if he could not settle claims of United States nationals against foreign governments (*id.* at 230). This consideration applies whether or not individual claimants happen to have filed suit in United States courts, as the present case illustrates.

In *Pink*, the Court viewed the power to settle claims as so essential that it could not be denied to the President unless the "historic conception of [his] powers and responsibilities * * * is to be drastically revised" (315 U.S. at 230). Before construing an Act of Congress such as the FSIA to have "drastically revised" the President's foreign relations powers in this manner, the Court must at least insist that "Congress speak with a clear voice" (*Pennhurst State School and Hospital* v. *Halderman*, No. 79-1404 (Apr. 20, 1981), slip op. 13). Compare note 33, *supra*.

In the FSIA, however, Congress has not spoken on the claims settlement issue at all. There is no mention of that authority in the text of the FSIA. Nor has petitioner cited any reference in the legislative history of the statute that suggests a congressional intent to bar the President from exercising the very claims settlement authority that Congress itself has long acknowledged to reside in the Executive, particularly in circumstances as compelling as the Iranian crisis. Indeed, petitioner concedes that "there is little indication that Congress considered emergencies such as the Iranian hostage crisis when it enacted the FSIA" (Pet. 18).[53]

[53] During the 1973 hearings on the precursor to the bill that became the FSIA, Administration witnesses referred to claims

And, finally, as the District of Columbia Circuit observed, "[t]he FSIA [was] drafted by the Departments of State and Justice,[54] and thus [was] unlikely to have been designed to restrict executive authority by implication." *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, *supra*, slip op. 29). Against this background there is no basis whatever for construing the FSIA as an attempted withdrawal of the Executive's constitutionally-based claims settlement authority wherever a suit on a particular claim will lie under the FSIA.[55]

In addition, petitioner's argument based on the FSIA ignores the limited purpose of that Act. "FSIA was directed toward a single topic—sovereign immunity." *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 20.[56] The Agreement with Iran and the implementing Executive Order and regulations do not

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settlement through diplomatic means, noting that this was "the traditional means whereby claims of citizens against foreign governments have been adjudicated or settled." *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 18 (1973); see also *id.* at 26, 31. Neither the witnesses nor the Subcommittee members expressed the view that this traditional means of settlement would be barred to the President merely because other remedies might be available by virtue of the FSIA.

[54] See H.R. Rep. No. 94-1487, *supra*, at 6; S. Rep. No. 94-1310, *supra*, at 11.

[55] Such a result would pose insurmountable barriers to the Executive where, as here, it is necessary to achieve an expeditious en bloc settlement of outstanding claims. Such settlements typically involve hundreds or even thousands of claims, and it would be impossible for the Executive to make the complex legal and factual judgments necessary to determine the availability of a remedy under the FSIA for each individual claim in order to determine for itself and to inform the foreign sovereign which outstanding claims were in fact to be included in the settlement arrangement.

[56] As the First Circuit noted (at 20 n.20), the FSIA did not, for example, affect the closely related Act of State doctrine.

purport to confer an immunity to suit upon the Iranian defendants, in contravention of the terms of the FSIA.[57] The Iranian defendants were required to appear and defend the suits on the merits until the district court stayed further proceedings pending presentation of petitioner's claim to the Tribunal. Suspension of the domestic effect of petitioner's claim merely rendered it a claim on which relief cannot be granted in federal district court for the period of the suspension, even though the Iranian defendants may be amenable to suit. The FSIA, of course, was "not intended to affect the substantive law of liability" (H.R. Rep. No. 94-1487, *supra*, at 12; S. Rep. No. 94-1310, *supra*, at 11). It is necessary to look outside the FSIA itself for the substantive law of liability to be applied by the court. In suits against Iran, the Executive Order and regulations implementing the Agreement establish that substantive law, and the district court here must apply it. See pages 47-50, *supra*.[58]

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[57] 28 U.S.C. 1606 provides that a foreign state not immune from suit "shall be liable in the same manner and to the same extent as a private individual under like circumstances." Contrary to petitioner's assertion (Pet. 15 n.7, 18), however, the Executive Order suspending the domestic effect of claims against Iran does not affect the *liability* of the Iranian defendants. They will remain fully liable on petitioner's claim, to the extent it is valid, when the claim is presented to the Tribunal.

[58] Under 28 U.S.C. 1604 and 1609, the foreign sovereign immunity principles in the FSIA are made subject to "existing international agreements" in effect when the FSIA was enacted. A provision in the bill proposed by the Departments of State and Justice that would have made the FSIA subject to "future" agreements as well was deleted in committee. H.R. Rep. No. 94-1487, *supra*, at 10; S. Rep. No. 94-1310, *supra*, at 6. In concluding that the FSIA had withdrawn the Executive's settlement authority with respect to claims for which the FSIA waived the foreign government's immunity to suit, the district court in *Marschalk Co.* v. *Iran National Airlines*, *supra*, relied in large part on the congressional committee's deletion of the reference to "future" agreements. But the reports state that "[t]he purpose for including the reference was to take into account the possibility that *sovereign immunity* might become

Finally, congressional actions both contemporaneous with [59] and subsequent to the enactment of the FSIA that endorse the President's claims-settlement authority are wholly inconsistent with the notion that Congress intended to terminate or infringe that authority when it passed the FSIA. As we have explained above (see pages 29-30, *supra*), Congress recognized and approved the President's claims-settlement authority when it enacted IEEPA in 1977, after the FSIA became law, to allow the President to freeze foreign assets in aid of that process. Moreover, in the Act of Oct. 18, 1976, Pub.

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the subject of an international convention" (H.R. Rep. No. 94-1487, *supra*, at 10 (emphasis added); S. Rep. No. 94-1310, *supra*, at 6 (emphasis added)). As we have explained, the Agreement with Iran and the implementing Executive Orders do not purport to confer upon the Iranian defendants an immunity to suit. Moreover, the reference to future agreements was deleted not to *prohibit* such agreements, but because the reference was "unnecessary and misleading" (*ibid.*). The reference was thought to be unnecessary because a convention entered into by the United States would, under Article VI of the Constitution, take precedence over the FSIA in any event. It was thought to be misleading because it might be construed affirmatively to authorize a future international agreement.

[59] The 94th Congress, which enacted the FSIA, also considered but did *not* enact proposals designed to limit the power of the Executive to enter into Executive Agreements. Executive representatives submitted testimony and legal arguments opposing the bills and supporting the authority of the President to enter into Executive Agreements, including claims-settlement agreements. See *Congressional Oversight of Executive Agreements—1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 243-261, 302-311 (1975); *Congressional Review of International Agreements: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 2d Sess. 167, 246 (1976). It is most unlikely that the same Congress that, after extensive consideration, declined to limit the President's authority to enter into Executive Agreements, accomplished that very goal through the FSIA, without anywhere stating that purpose. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974).

L. No. 94-542, 90 Stat. 2509-2513, which became law just three days prior to the FSIA, Congress amended the International Claims Settlement Act of 1949 to authorize the Foreign Claims Settlement Commission "to receive and determine * * * the validity and amounts of [certain] claims by nationals of the United States against the German Democratic Republic * * * " (22 U.S.C. 1644b). Congress established a special claims fund for the payment of such claims, to be "composed of such funds as may be paid to the United States by the German Democratic Republic pursuant to the terms of any agreement settling such claims" (22 U.S.C. 1644a(5)).[60] Under the statutory provisions governing the Commission's work generally, the action of the Commission in allowing or denying any claim is "final and conclusive" and is not subject to review "by any court by mandamus or otherwise" (22 U.S.C. 1623(h)). See *Z. & F. Assets Realization Corp.* v. *Hull*, *supra*, 311 U.S. at 489; *DeVegvar* v. *Gillilland*, 228 F.2d 640, 642 (D.C. Cir.), cert. denied, 350 U.S. 994 (1956); *First National City Bank* v. *Gillilland*, 257, F.2d 223, 226-227 (D.C. Cir.), cert. denied, 358 U.S. 837 (1958). Congress' preclusion of judicial review of the Commission's decisions in granting or denying an award to be paid out of the monies received in settlement of claims is at odds with the assertion that Congress intended in the FSIA to give claimants an absolute right to press their claims against foreign sovereigns in court even though the Executive has provided for the settlement of the claims.

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[60] The "reason for this bill" was to allow the Executive to "be in a better position to negotiate an adequate settlement * * * of these claims" (S. Rep. No. 94-1188, 94th Cong., 2d Sess. 2 (1976)). See generally *Status of Claims Settlements With Nonmarket Countries, East German Claims Bill: Hearings on H.R. 14642 Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 2d Sess. 1, 17, 26, 29-32, 42, 50, 52, 68 (1976).

Similarly, Congress amended the International Claims Settlement Act in 1980 to provide for determination of claims against Vietnam (Act of Dec. 28, 1980, Pub. L. No. 96-606, Section 701, 94 Stat. 3534), again contemplating a future "agreement settling those claims" (Section 702(5), 94 Stat. 3535).[61] Congress also has indicated its approval of the claims settlement agreement with the People's Republic of China, under which the United States accepted $80.5 million in full and final settlement of specified claims against the People's Repubic (see note 39, *supra*), by establishing an amended allocation formula for distribution of the funds received pursuant to the agreement. Act of Oct. 13, 1980, Pub. L. No. 96-445, 94 Stat. 1891; see also H.R. Rep. No. 96-915, 96th Cong., 2d Sess. 2 (1980).

In sum, the Executive, which proposed the FSIA, has never understood that Act to affect its established power to settle claims of American nationals, and the Agreement with Iran was entered into on that understanding. Particularly in light of Congress' recognition of the President's claims-settlement authority and the absence of any indication in the FSIA or its legislative history that Congress intended to withdraw or diminish that authority, the Court should not adopt a construction of the FSIA that might well place the United States in breach of its international obligations under a solemn agreement entered into to resolve the grave crisis then confronting the Nation. Such a construction could have serious consequences for the United States both in this instance (see page 9, *supra*), and in future crises as well.

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[61] See H.R. Rep. No. 96-915, 96th Cong., 2d Sess. 2-3 (1980); *Adjudication of Claims Against Vietnam: Hearing on H.R. 2200 Before the Subcomm. on Asian and Pacific Affairs and on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 1, 3, 4, 6, 7, 10, 12, 18 (1979).

C. The President's Actions Do Not Constitute A Taking Of Property Without Just Compensation

Although petitioner lists among the questions presented by its petition the question whether the President's actions constitute an unconstitutional taking of property (Pet. i), petitioner does not press that argument in the body of its petition. In any event, the taking argument is without merit.

The President has exercised two distinct powers that affect petitioner's suit against the Iranian defendants. First, he has exercised his authority under IEEPA to direct the transfer of Iranian property, including that against which petitioner had obtained orders of attachment. But petitioner's attachments were obtained as a result of a license that was expressly made revocable at any time and was in any event subordinate to the President's paramount and previously acquired power to direct the transfer of the property pursuant to IEEPA. The President's revocation of the conditional license for attachments and his transfer of the property under IEEPA therefore do not constitute a taking within the meaning of the Just Compensation Clause. See *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 12-13; *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, *supra*, slip op. 38-39; see note 29, *supra*.

The President also has exercised his separate power under the Constitution and statutes to settle claims against Iran by providing for their submission to arbitration. The arbitration will be conducted by experienced arbitrators, applying internationally recognized rules of procedure, and the Government of Iran is obligated to satisfy all awards made by the Claims Tribunal. If there are insufficient funds in the escrow account, the Tribunal's awards may be enforced "in the courts of any nation

in accordance with its laws" (Decl. I, ¶ 7; Decl. II, Art. IV, ¶ 3; Pet. App. 25, 32). If petitioner's claim is found by the Tribunal *not* to be within its jurisdiction, petitioner may proceed with its lawsuit in federal court. In that event, the existence of petitioner's cause of action against the Iranian defendants will have been unaffected by the President's actions, and therefore plainly could not form the basis of a taking claim. But petitioner's underlying claim against Iran likewise is unaffected even if that claim *is* within the Tribunal's jurisdiction. The effect of the Agreement in that event would simply be to provide for the same claim to be heard in a different forum.

Petitioner nonetheless apparently contends that the provision for settlement of its claim through arbitration rather than litigation constitutes an unconstitutional taking of its property. Both courts of appeals that have considered the taking issue with respect to the settlement of claims have found it to be premature, because it necessarily depends on speculation about possible obstacles to recovery through the arbitration process. *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, *supra*, at 23-24; *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, *supra*, slip op. 34-38. We agree. Indeed, petitioner's taking claim necessarily depends on the factual assumption that the arbitration process will not operate in practice in the manner set forth in the Agreement. For if the Agreement is implemented as planned, meritorious claims within the Tribunal's jurisdiction will be fully satisfied.[62] We do not believe it would be appropriate in considering the taking claim to indulge the presumption that an international agreement such as this, to which each Nation has committed itself and its resources, will not provide the just remedy it promises.

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[62] In that event, there would be no valid claim of a Fifth Amendment violation both because the cause of action was not taken and because, in any event, just compensation was paid.

In any event, the mere substitution of one competent forum for another to hear the same underlying claim and to award complete relief if the claim is found to be meritorious cannot be thought to constitute a taking of property in violation of the Fifth Amendment. This is particularly so when the provision for arbitration—which this Court has frequently recognized to be an appropriate means for resolving international disputes (see note 40, *supra*)—is made pursuant to the President's broad constitutional and statutory power in time of crisis, in a good faith effort to protect the interests of the claimants themselves. See pages 13-14, *supra*. Cf. *United States* v. *Sioux Nation of Indians*, No. 79-639 (June 30, 1980), slip op. 43-45.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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JUNE 1981

APPENDIX

Executive Order 12170 of November 14, 1979

BLOCKING IRANIAN GOVERNMENT PROPERTY

Pursuant to the authority vested in me as President by the Constitution and laws of the United States including the International Emergency Economic Powers Act, 50 U.S.C.A. sec. 1701 *et seq.*, the National Emergencies Act, 50 U.S.C. sec. 1601 *et seq.*, and 3 U.S.C. sec. 301,

I, JIMMY CARTER, President of the United States, find that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and hereby declare a national emergency to deal with that threat.

I hereby order blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.

The Secretary of the Treasury is authorized to employ all powers granted to me by the International Emergency Economic Powers Act to carry out the provisions of this order.

This order is effective immediately and shall be transmitted to the Congress and published in the Federal Register.

/s/ Jimmy Carter

THE WHITE HOUSE,
November 14, 1979.

DECLARATION OF ALEXANDER M. HAIG, JR.

I, Alexander M. Haig, Jr., declare under penalty of perjury as follows:

1. I am the Secretary of State. Under the direction of President Reagan, I am responsible for coordinating the execution of United States foreign policy. In this capacity, I have studied the agreements concluded by President Carter on January 19, 1981, for the release of the American hostages in Iran, and participated in the policy review that lead to President Reagan's decision to implement those agreements in strict accordance with their terms.

2. A number of actions contemplated by the agreements have already been carried out including, particularly, the release of the 52 former hostages and the unblocking of nearly $8 billion of Iranian assets that were held in the Federal Reserve Bank of New York and in the foreign branches of U.S. banks. Approximately $5.1 billion of those funds have been made available for payment of loans made by American banks and their syndicate partners.

3. Important commitments remain to be implemented under the agreements. These commitments include the establishment of an arbitration process for the resolution of U.S. commercial claims against Iran; the establishment of a $1 billion security account for the payment of arbitral awards made to U.S. claimants; the transfer of Iranian assets from the United States into the security account and to Iran; and the termination through arbitration of U.S. commercial claims against Iran.

4. The Administration has determined that the conclusion of the agreements was a legal exercise of Presidential authority and that the United States should implement these agreements because they are in the interest of the United States. They represent the surest way of resolving many of the financial problems between the

United States and Iran consistent with the interests of U.S. claimants and the broader interests of the United States in the Persian Gulf area, a region of strategic importance to the United States.

5. If the United States should be prevented from freeing the Iranian assets from judicial restraints, it will not be able to carry out its commitment to return the assets to Iran or to fund the security account which is to be used to pay arbitration awards. In this event, the whole structure of the agreements may begin to crumble, and there could be set in motion a series of actions and reactions that would have serious consequences both for the claimants and for the foreign policy of the United States.

6. Judicial action preventing the United States from carrying out its obligations under these agreements would seriously damage the President's capacity to speak and act for the United States in the conduct of its foreign relations, and would be perceived abroad as a serious weakness in the ability of the United States Government to carry out its international commitments. It is my judgment that the foreign policy and national security interests of the United States would be best served if the President is permitted to implement the Iranian agreements in accordance with their terms.

/s/ Alexander M. Haig, Jr.
ALEXANDER M. HAIG, JR.

Executed on February 24, 1981.

15 Weekly Comp. of Pres. Doc. 2117 (Nov. 14, 1979)

BLOCKING IRANIAN GOVERNMENT PROPERTY

Announcement of the President's Action.
November 14, 1979

The President has today acted to block all official Iranian assets in the United States, including deposits in United States banks and their foreign branches and subsidiaries. This order is in response to reports that the Government of Iran is about to withdraw its funds. The purpose of this order is to ensure that claims on Iran by the United States and its citizens are provided for in an orderly manner.

The order does not affect accounts of persons other than the Government of Iran, the Central Bank of Iran, and other controlled entities. The precise amounts involved cannot be ascertained at this time, but there is no reason for disturbance in the foreign exchange or other markets.

The President is taking this action pursuant to the International Emergency Economic Powers Act, which grants the President authority "to deal with any unusual and extraordinary threat to the national security, foreign policy, or economy of the United States."

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 349163 512

No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

DAMES & MOORE, a partnership,

Petitioner,

—vs.—

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents,

—and—

ISLAMIC REPUBLIC OF IRAN and ATOMIC ENERGY ORGANIZATION OF IRAN,

Intervenor-Respondents,

—and—

BANK MARKAZI IRAN,

Intervenor.

BRIEF OF INTERVENOR-RESPONDENT ATOMIC ENERGY ORGANIZATION OF IRAN

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Question Presented

Whether Petitioner's claims against Intervenor-Respondents are sufficiently different in kind or status to take them outside the indisputable authority of the President to settle foreign claims as part of his control of foreign relations?

TABLE OF CONTENTS

PAGE

Questions Presented i

Statement of the Case 2

Summary of Argument 10

Argument 10

Conclusion 15

Appendix—

Docket Entries in *Dames & Moore* v. *Atomic Energy Organization of Iran, et al.*, No. 79-04918 LEW (C.D. Cal.) A-1

Complaint A-25

Excerpts from Agreement Dated December 8, 1977 ..... A-38

Findings of Fact and Conclusions of Law A-39

Notice of Entry of Judgment A-49

Judgment A-51

Table of Authorities

Cases:

Mossman v. *Higginson*, 4 U.S. (4 Dall.) 12 (1800) 13n

Ozanic v. *United States*, 188 F.2d 228 (2d Cir. 1951) 11

United States v. *Belmont*, 301 U.S. 324 (1937) 10, 11, 12, 13

United States v. *Pink*, 315 U.S. 203 (1942) 10, 12, 13, 14, 15

Verlinden B.V. v. *Central Bank of Nigeria*, C.A. No. 80-7413 (2d Cir. April 16, 1981) 13n

Regulations: PAGE

31 C.F.R. § 535.203 (1979) 3

31 C.F.R. § 535.502 (1979) 3

31 C.F.R. § 535.504 (1979) 3

Executive Orders:

Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 15, 1979) 3

Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (April 21, 1980) 5

No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

DAMES & MOORE, a partnership,

Petitioner,

—vs.—

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA.

Respondents,

—and—

ISLAMIC REPUBLIC OF IRAN and ATOMIC ENERGY ORGANIZATION OF IRAN,

Intervenor-Respondents,

—and—

BANK MARKAZI IRAN,

Intervenor.

BRIEF OF INTERVENOR-RESPONDENT ATOMIC ENERGY ORGANIZATION OF IRAN

Intervenor-respondent the Atomic Energy Organization of Iran ("AEOI") submits this brief on the merits and respectfully prays that the judgment below dismissing the complaint be affirmed. AEOI, an instrumentality of the Iranian government, is a defendant in the underlying suit for breach of contract pending in the United States District Court for the Central District of California (the "Underlying Action").*

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* *Dames & Moore* v. *Atomic Energy Organization of Iran et al.*, 79 Civ. 4918 (LEW) (C.D. Cal).

Statement of the Case

In this case (styled the "Action Below" to distinguish it from the Underlying Action), Petitioner seeks to bar the President from implementing certain provisions of the Algerian Declarations entered into by the United States and Iran to resolve the recent international impasse. Those provisions would suspend further litigation of the Underlying Action, vacate and nullify any and all prejudgment attachments or post-judgment executions obtained by Petitioner in the Underlying Action and remit Petitioner's claim asserted in the Underlying Action, together with the several hundred other claims pending against Iranian entities, to an international arbitration tribunal whose awards would be secured at the outset by a deposit of $1 billion. Because other parties will brief issues involving presidential power in greater detail, this brief will focus on the nature of Petitioner's claim and its procedural status in the Underlying Action in order to provide a context in which to view Petitioner's contentions made in the Action Below.

The Underlying Action (Complaint, A-25)* asserts a claim for breach of a contract executed on December 8, 1977 by AEOI and Dames & Moore International, S.R.L., a Venezuelan corporation with its principal place of business in Tehran, Iran (hereinafter "Dames & Moore International"). Contract, A-38. Petitioner claims to own Dames & Moore International and to hold an assignment of its claim against AEOI that is the subject of the Underlying Action. Complaint ¶¶ 11, 14, A-28.

Under the contract, Dames & Moore International was to provide geological and earth science consulting services

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* References to the appendix to this brief appear as "A- ." References to Petitioner's Appendix to the Petition for a Writ of Certiorari appears as "PA- ."

to AEOI in the selection of an appropriate site in Iran for the location of a nuclear power reactor. Certain of the work was performed, but in June, 1979, after the commencement of the Iranian revolution, AEOI exercised its unilateral right of termination of the agreement giving rise to the claims asserted in the Underlying Action. Complaint ¶ 23, A-30.

No litigation was commenced by Petitioner or by Dames & Moore International with respect to the terminated contract until well after the dramatic events that occurred in Tehran during early November 1979. As is well known, on November 14, 1979, President Carter blocked transfer of all Iranian assets within the control of the United States. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 15, 1979). The Treasury Department issued regulations which declared "null and void" any injunctions, judgments, liens and other similar relief against property in which Iran or its entities had an interest without first obtaining a license.* 31 C.F.R. §§ 535.203, 535.502 (1979). Treasury regulations did permit judicial proceedings to be commenced and maintained, including the securing of prejudgment attachment orders, provided that the litigation did not go to final judgment or execution against the attached property. 31 C.F.R. § 535.504 (1979). Hundreds of lawsuits against Iranian entities were commenced soon thereafter.

The Underlying Action was filed against AEOI, the Islamic Republic of Iran ("Iran") and 28 Iranian banks on December 19, 1979, one month after President Carter had blocked the Iranian assets. Petitioner obtained several orders of *ex parte* pre-judgment attachment (A-3, Items 13, 14, 19; A-4, Item 28) directed at the already blocked

* Such a license has never been sought or obtained by Dames & Moore.

assets of Iranian entities located within the jurisdiction of the district court. No assets of AEOI have been attached, and as far as is known none are within the United States.

The complaint sets forth causes of action for breach of contract, account stated and *quantum meruit* and seeks damages of nearly $3.5 milion plus interest. None of the Iranian banks joined as defendants were parties to the contract. Indeed, they were strangers to the transaction. In the Underlying Action, as in countless other cases filed throughout the country, the Iranian banks were joined and their assets and deposits sought to be attached on the theory that all Iranian entities are the same.

Management of what soon became known as the "Iranian Assets Litigation" (complete with its own Iranian Assets Litigation Reporter) became a difficult task. The Underlying Action was, of course, only one of more than 400 actions commenced against Iran or its governmental entities in the state and federal courts. Attempts to consolidate common issues of law and fact were largely unsuccessful. Two motions to the Judicial Panel on Multidistrict Litigation to transfer to the Southern District of New York the Underlying Action with other similar actions were denied. Motions to stay the Underlying Action pending a determination of these separate motions to transfer were also denied. A-5, Item 35; A-8, Item 60.

Notwithstanding that the Underlying Action and all other Iranian cases were progressing in the very midst of a continuing international crisis, the district court refused the requests of the United States government to stay the proceedings. Suggestions of Interest were filed at several stages in the proceedings in an effort to convince the district court that continued prosecution of the litigation would hamper State Department efforts to bring an end

to the impasse through diplomatic means. A-3, Item 21; A-8, Item 71; A-10, Item 91; A-19, Item 155.

As the diplomatic impasse continued, developments outside the courtroom made defense of the Underlying Action increasingly difficult. On April 7, 1980, President Carter ordered the withdrawal of the Iranian diplomatic corps from the United States and closed the Iranian Embassy. A ban on travel between Iran and the United States was placed in effect. Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (April 21, 1980). Communications, difficult under ordinary circumstances, were often made more so by the unavailability of Iranian representatives with whom to confer and by the virtual impossibility of travel between the two countries. These difficulties were compounded by the outbreak of war between Iran and Iraq. In the circumstances, lawyers defending Iranian entities like AEOI in hundreds of lawsuits found defense of the litigation difficult at best and often impossible.

It is in this context that the Underlying Action pressed forward. During the first six months of 1980, activity in the litigation focused on Petitioner's successful efforts to obtain attachments and to oppose the attempts of the defendants and the United States to obtain stays. A-4, Items 30, 31; A-7, Item 58. During August and September 1980, the Iranian Banks filed motions to dismiss for lack of jurisdiction. A-8, Item 67; A-9, Item 78. These motions were adjourned at Petitioner's request to provide Petitioner an opportunity to seek discovery. A-9, Items 80, 82.

In early December 1980, as the diplomatic impasse reached its apogee, Petitioner sought an order compelling answers to interrogatories, production of documents and the appearance of certain AEOI officers at depositions to be held either in the United States or in England. A-11,

Item 99. Of course, during late December 1980 and early January 1981, compliance with discovery demands was impossible. Petitioner's motion was nonetheless granted at a magistrate's hearing on December 30, 1980, and a formal order was filed on January 14, 1981. A-14, Item 120; A-17, Item 139. AEOI moved to reconsider, and a hearing was set for March 16, 1981. A-20, Item 159. Although without the benefit of discovery, Petitioner opposed the banks' motions to dismiss. Those motions were denied out of hand by the district court on January 20, 1981, one day after the voluminous papers were submitted. A-19, Item 148.

It was on January 19, 1981, that the United States and Iran reached the diplomatic accord that brought an end to the fourteen-month international impasse. Principals for both countries initialled the Algerian Declarations providing, *inter alia*, for (i) the return of the fifty-two Americans from Iran; (ii) the return to Iran within six months of all Iranian assets frozen in the United States by President Carter's November 14, 1979 blocking order; (iii) the establishment of an international claims tribunal to hear the remaining claims of United States nationals against Iran and its governmental entities; (iv) the establishment by Iran of an escrow fund initially of $1 billion, not to fall below $500 million at any time, to secure payment of arbitration awards; and (v) termination of all suits pending in all courts in the United States against Iran and its governmental entities. PA-21-35.

The signing of the Algerian Declarations was followed by a series of Executive Orders by which President Carter revoked all previous licenses and prohibited all persons from thereafter acquiring or exercising any right, power or privilege, by court proceeding or otherwise, with respect to Iranian assets. PA-36-51. The Executive Orders were

in furtherance of the major objectives of the claims settlement provisions of the Declarations which were:

> "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration." PA-22.

Apparently dissatisfied with the prospect of proceeding to an international arbitration with any and all jurisdictional defenses removed, Petitioner accelerated the pace in the Underlying Action on January 27, 1981, by filing a motion for summary judgment against AEOI and Iran returnable February 17, 1981. A-19, Item 149. In documents filed eight days after the Algerian Declarations were executed, Petitioner baldly claimed in its memorandum supporting the motion that "[t]he facts here are not in dispute" (despite contrary recitals made to justify its motion to compel discovery) and urged entry of final judgment for the total amount of its claim. Coupled with its summary judgment motion was a motion seeking to prohibit defendants from opposing the motion because—despite the swirl of diplomatic events in December 1980 and January 1981, the difficulties of transportation and communication and Iran's war with Iraq—AEOI had not yet produced witnesses for a deposition. On January 29, 1981 the United States filed a third Statement of Interest asking the district court (as it did in most other pending cases) to stay further proceedings until February 26 to allow President Reagan and the new administration time to review the Declarations and the Executive Orders. A-19, Item 155.

The district court refused the stay requested by the United States government, and Petitioner refused to stipulate to any extension of time to respond to its motions. AEOI and Iran moved for an order continuing the summary judgment hearing until March 16 to provide time to try to adequately prepare to oppose the motion, to allow President Reagan to promulgate regulations concerning the Algerian Declarations and to permit the Justice Department to file with the court a statement or motion regarding the position of the United States with respect to all pending suits, including the Underlying Action. A-19, Item 154.

This first request for a month's extension of time was denied by the district court on February 6. A-20, Item 160. The result was that the only possible opposition AEOI could mount on the return date, February 17, was oral argument from the factual record created by Petitioner. The district court granted summary judgment the following day and entered 46 of the 48 separate findings of fact and conclusions of law proposed by Petitioner virtually without change. A-20, Items 162, 163. AEOI and Iran have filed a timely notice of appeal. A-21, Item 175.

Immediately thereafter, Petitioner filed the California judgment in two counties in the State of Washington where assets belonging to other Iranian entities were located. PA-15. A third filing was made March 5, a week after President Reagan announced adherence by the new Administration to the Algerian Declarations and published regulations enforcing their terms. PA-17. Writs of garnishment and execution upon the property followed within days, and at least one sheriff's sale was scheduled.

Racing against the deadline for the transfer of Iranian assets back to Iran called for in the Algerian Declara-

tions and Treasury regulations, Petitioner filed the Action Below on April 28, 1981. PA-1-87. The complaint sought declaratory and injunctive relief on the grounds that the President was without power to affect Petitioner's judgment, attachments and right to execute on its judgment in the Underlying Action.

On May 14, 1981, the United States moved to dismiss the complaint in the Action Below on the ground that it failed to state a cause of action and sought to stay execution of the judgment in the Underlying Action and to vacate the attachments obtained. PA-88. Petitioner opposed those motions and moved for a preliminary injunction prohibiting interference with its enforcement efforts. In an order dated May 28, 1981 and entered June 4, 1981 (PA-106), the district court granted the government's motions, denied Petitioner's motion and stayed the judgment and vacated the attachments in the Underlying Action. It is this order which is now before this Court.

This, then, was the genesis of the "legally enforceable claims" and "attachment liens and judgment liens imposed by process of United States courts" which Petitioner urges are beyond the foreign relations powers of the President. Petition for a Writ of Certiorari at i.

Petitioner appealed to the Ninth Circuit and thereafter, on June 10, petitioned this Court for a writ of certiorari. On June 11, 1981, certiorari before judgment was granted, the motion of AEOI and Iran to intervene as respondents was granted and the motion of Bank Markazi Iran to intervene was also granted.

Summary of Argument

Petitioner's claim to Iranian assets in this case is no different in kind or status from those claims that have historically been subject to disposition pursuant to the President's broad powers over foreign relations. The claim here is in competition with the rights of a foreign government. Moreover, the claim was settled in the context of a larger diplomatic accord entered into by the President acting pursuant to his sole responsibility over foreign affairs. The claim, though reduced to judgment and secured by attachments, remains non-final and of questionable validity because of the circumstances of which Petitioner took advantage. These characteristics of Petitioner's claim make it indistinguishable from those considered by the Court in *United States* v. *Pink* and *United States* v. *Belmont* to be within the control of the President.

ARGUMENT

Petitioner's Claims Are No Different From the Claims That Have Historically Been Subject to Presidential Action.

The power of the President to control the foreign affairs of the United States is beyond question. This Court thoroughly considered the power of the President to settle the claims of individual claimants against foreign governments in *United States* v. *Pink*, 315 U.S. 203, 229 (1942), and said that settlement of claims

> "certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.' . . . Effectiveness in handling the delicate problems of foreign relations requires no less. Unless such a

> power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs . . . is to be drastically revised. It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent. We would usurp the executive function if we held that that decision was not final and conclusive in the courts." *Id.* at 229-230.

Justice Frankfurter commented in his concurring opinion: "That the President's control of foreign relations includes the settlement of claims is indisputable." *Id.* at 240. *See also United States* v. *Belmont*, 301 U.S. 324 (1937); *Ozanic* v. *United States*, 188 F.2d 228, 231 (2d Cir. 1951) ("The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims").

Conceding as it must this well-settled concept of presidential power, Petitioner argues that it is somehow different from the many others whose claims have been settled in the interest of foreign policy objectives. It seeks to paint the President's claims settlement powers into a historical corner with the following analysis :

1. In the 1930's and 1940's, when a foreign state had absolute immunity, the President's assistance was indispensable in order to obtain settlement of claims;

2. Even later, when immunity was read more restrictively, the President's intercession in claims disputes was

still necessary because execution upon judgments obtained against foreign states was unusually difficult at best, if not impossible;

3. Today, however, where both a judgment and assets to execute upon have been secured in this country, the President's help is not needed.

Petitioner's arguments, however, misinterpret the scope and purpose of Presidential power over foreign affairs. The President is empowered to deal with claims in the context of an international crisis not for the sole purpose of bestowing a benefit upon the claimants but for the purpose of benefitting the country as a whole. The effect on claims, whatever it may be, is incidental to whatever foreign affairs ends the President in his sole discretion may choose. To assert that these global foreign affairs objectives must be subservient to the commercial claims of Petitioner is surely the tail wagging the dog.

This broad foreign affairs authority has been firmly established by this Court. *United States* v. *Pink, supra; United States* v. *Belmont, supra.* Contrary to the attempts of Petitioner to dissociate itself from the clear import of the Court's rulings in those cases, this case is no different. Here, as on prior occasions, a claim against a foreign governmental entity was settled by the President exercising his role as "sole organ of the federal government in the field of foreign relations" in the course of resolution of larger issues of world diplomacy.

First, like *Pink* and *Belmont,* this case involves competing claims of private claimants to the assets of a foreign governmental entity. In *Pink*, the claimants, private creditors who had filed attachments, sought recovery of assets formerly held by the New York branch of a private Russian insurance company and later obtained by the New

York State Superintendent of Insurance for distribution to creditors. The assets were also claimed by the Soviet Union pursuant to a decree nationalizing the assets. The private claims were in the process of liquidation by the Superintendent when the United States and the Soviet Union entered into the so-called Litvinov Assignment by which, *inter alia*, the Soviet Union assigned to the United States all of its rights in the disputed assets. The assignment was part of the diplomatic agreement whereby the United States recognized, after some fifteen years, the government of the Soviet Union.

The United States brought suit against the Superintendent of Insurance to release the assets to it instead of distributing them to the private claimants. This Court, following its decision in *United States* v. *Belmont, supra* (also involving the Litvinov Assignment), held that the United States was entitled to the assets because of the plenary power of the President in the field of foreign relations, which included the settlement of claims.

Second, as in *Pink*, the settlement of the claims in this case was part of a larger solution to an international and foreign affairs matter over which the President had exclusive responsibility and control. Here, the private claimant* seeks recovery against Iranian entities in a dispute that has since been suspended in the interest of resolution of the international impasse. The delicacy of the foreign

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* It is not at all clear that the district court has jurisdiction of this case to begin with. Although the Petitioner is an American partnership, Petitioner's assignor is a Venezuelan company registered in Iran. Even if this is not a case involving aliens as to which the federal courts may lack subject matter jurisdiction, *Mossman* v. *Higginson*, 4 U.S. (4 Dall.) 12 (1800); *Verlinden B.V.* v. *Central Bank of Nigeria*, C.A. No. 80-7413 (2d Cir. April 16, 1981), it may be subject to dismissal under the Foreign Sovereign Immunities Act. If this Court does not affirm the Action Below, these issues will have to be litigated and determined.

policy issues sought to be resolved by Presidents Roosevelt and Carter in each situation is readily apparent. In neither case was the settlement of the claims directly related to the foreign policy objectives that each President sought to achieve. Yet in both cases the settlements reflected the judgment of the executive branch that the treatment given to the claims was in the interest of broader national objectives.

Indeed, in this case the claims were not settled or released at all but were merely referred to a claims tribunal for further disposition on the merits. Moreover, the arbitration awards are secured by a $1 billion escrow fund. Thus, in the pursuit of the foreign policy goals in this case, President Carter secured more for the Petitioner here than President Roosevelt did in *Pink*.

Third, the strength of the claims here is no better than that of the claims in *Pink*. *Pink* involved liquidated claims to the assets of an insurance company. Although Petitioner would have this Court believe that its summary judgment as secured by its several attachments is on a higher plane, an examination of the circumstances under which it came about demonstrates that it is no different. The litigation was pressed forward by Petitioners in the thick of a diplomatic impasse. Communication between the American lawyers and their Iranian clients was extremely difficult. Transportation was forbidden, making face-to-face lawyer-client contact impracticable. Iran's war with Iraq made coordination of the defense of the more than 400 cases against Iranian governmental entities often impossible. Extensions of time were freely granted to Petitioners, but on the crucial motion for summary judgment extra time was denied to AEOI and Iran. No serious consideration has yet been given to the substantial jurisdictional and immunity defenses.

Securing the judgment with the attachments, moreover, was like shooting fish in a barrel once the blocking order was in place. Indeed, virtually none of the 400 cases was commenced and virtually none of the attachments was secured until the Iranian assets were safely anchored by the President within the boundaries of the United States. The irony, of course, is that the regulations that froze the assets also forbade entry of the judgment that Petitioner nevertheless sought and obtained. Petitioner seeks to reap the benefits of the President's foreign affairs powers exercised in blocking the assets, but shoulder none of the responsibilities and burdens associated with his resolution of the impasse.

Petitioner's non-final order of summary judgment and the attachments, made possible only because of the blocking order, rise to no more than the claims in *Pink*, and probably amount to less.

CONCLUSION

For all the foregoing reasons, the judgment in the Action Below should be affirmed.

Respectfully submitted,

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APPENDIX

Docket Entries

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
No. 79-04918 LEW (Px)

DAMES & MOORE, a partnership,

Plaintiff,

vs.

ATOMIC ENERGY ORGANIZATION OF IRAN, STATE AND GOVERNMENT OF IRAN, BANK MELLI IRAN, INDUSTRIAL CREDIT BANK, INDUSTRIAL AND MINING DEVELOPMENT BANK OF IRAN, INTERNATIONAL BANK OF IRAN, AGRICULTURAL DEVELOPMENT BANK OF IRAN, BANK MARKAZI IRAN, BANK OF TEHRAN AGRICULTURAL COOPERATIVE BANK OF IRAN, BANK BAZARGANI IRAN, BANK BIMEH IRAN, BANK IRANSHAHR, BANK DARIUSH, BANK KAR, THE BANK OF IRAN AND THE MIDDLE EAST, BANK OF OMRAN, BANK PARS, BANK RAFAH KARGARAN, BANK SADERAT IRAN, BANK SAKHTEMAN, BANK SANAYE IRAN, BANK SEPAH, BANK SHAHRYAR, BANQUE ETEBARATE IRAN, DEVELOPMENT AND INVESTMENT BANK OF IRAN, DISTRIBUTORS COOPERATIVE CREDIT BANK, THE FOREIGN TRADE BANK OF IRAN, IRANIANS' BANK, MORTGAGE BANK OF IRAN,

Defendants.

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Docket Entries

Date	*Proceedings*
12–19–79	1. Fld complt. Issd sums.
	2. Fld reqst & ord fr srvc by other than U.S. Marshal naming Artavaz Melikian or George Elberson. Case may be referred to magistrate Penne for disc.
12–20–79	3. Fld pltf's Dames & Moore, memo of P/A in supprt of ex parte applic for right to attach ORD and writ of attachmnt.
12–20–79	4. Fld pltf's Dames & Moore, affid of William R. McCrystal.
12–20–79	5. Fld pltf's applic for right to attach ord, ex parte, ord for iss of writ of attach agnst property of nonresidnt.
	6. Fld pltf's undertakng bond on attachmnt fr United Pacific Ins Co.
	7. Fld pltf's ex parte right to attach ord & ORD for iss of writ of attachmnt, Issd.
1–4–80	8. Fld pltf's additnl undertkg bond on attachmnt fr United Pacific Ins. Co. for $7,500.00.
	9. Fld pltf's ex parte ORD for iss of writ of attachmnt. Issd.
	10. Fld pltf's memo of P&A in supp of ex parte applic for iss of writ of attachmnt.
	11. Fld pltf's aff of William R. McChrystal.
	12. Fld pltf's ex parte applic for addtl writ of attachmnt.

Docket Entries

Date		*Proceedings*
12–20–79	13.	MIN ORD: ORD that the right to attach ord & ord for iss of writ of attachmnt be issd.
1–4–80	14.	MIN ORD: ORD approving the iss of an addi-tnl writ of attachmnt; pltf fld bond for $7,500.
2–4–80	15.	Fld pltf's memo of P&A in supp of ex parte applic for right to attach ord & ord for iss of a writ of attach.
	16.	Fld pltf's declar of Robert M. Perry in supp of applic for ex parte right to attch ord & ord for iss of a writ of attach.
	17.	Fld pltf's ex parte right to attach ord & ORD for iss of writ of attach.
	18.	Fld pltf's applic for right to attch ord & addl writ of attach.
2–4–80	19.	MIN ORD: that ex parte right to attach ord & ord for iss of writs of attach, residnt be Issd.
2–27–80	20.	Fld pltf's req & ord for serv of process by other than the USM, Nancy Miller.
3–10–80	21.	Fld USA's suggestn of interest.
3–20–80	22.	Fld pltf's applic for addtl writ of attch, ex parte & ord for iss.
	23.	Fld pltf's memo in supp of ex parte applic for ord for iss of writ of attch & addtl writ of attach
	24.	Fld pltf's declar of Jeffrey M. Hamerling in supp of applic for ex parte ord for iss of attachmnt.

Docket Entries

Date	*Proceedings*
	25. Fld pltf's declar of William R. McChrystal in supp of applic for ex parte ord for iss of writ of attachmnt.
	26. Fld deft's notc of mtn to stay proceedngs, memo of P&A & declar of Chris G. Gasparich rtnbl 4-7-80, 9 AM.
3–20–80	27. Fld pltf's ex parte applic & ORD that a writ of attachmnt shall not be availbl to the public until the USM has served Bank Saderat Iran w/writ of attachmnt issd tody. Fld UNDER SEAL ord for iss of writ of attachmnt.
	28. MIN ORD: ORD that ex parte right to attach ord & ord for iss of writs of attach (resident) be issd, & that they be seald until the writ is servd by USM.
3–31–80	29. Fld pltf's declar of James B. Thompson.
	30. Fld pltf's memo of P&A in oppos to mtn to stay proceedngs.
4–2–80	31. Fld pltf's declar of serv of memo of P&A in oppos to mtn to stay proceedngs.
4–3–80	32. Fld pltf's correctn of typographical error.
4– 4–80	33. Fld pltf's ex parte applic & ORD that pltfs may serv deft in this actn, other than the State & Gov't of Iran & Bank of Saderat Iran, by causing true & correct copies of the sms & complt

Docket Entries

Date	*Proceedings*
	34. Fld deft's suppl declar of Chris G. Gasparich in supp of mtn to stay proceedngs
4– 7–80	35. MIN ORD: Islamic Republic of Iran's mtn for ord staynq all proceedngs is DENIED
	36. Fld deft's notc of mtn & mtn for ord modifying right to attach ord & notc thereof rtnbl 5-5-80, 9AM
	37. Fld deft's memo of P&A in supp of mtn for ord modifying right to attach order
4–16–80	38. Fld rtn of serv of sms, servd Directr of the Office of Special Consular Serv on 4–11–80
4–22–80	39. Fld ORD denyng mtn of Islamic Republic of Iran to stay proceedngs
5– 5–80	40. Fld pltf's memo in oppos to mtn for ord modifying right to attach ord (PLACED UNDER SEAL)
4–30–80	41. Fld Stip & ORD cont hrg on mtn for ord modifying right to attach ord to 5–12–80, 9AM & oppos due 5–5–80
5– 7–80	LODGED deft's prop ord modifying right to attach ord & denyng establishng procedres frgrding attachmnt
5– 7–80	LODGED deft's prop ord settng specl hrg on motn for ord modifying rght to attacc ord
	42. Fld deft's certificate of svc of declar of Emiliano P. Reyes, Jr in suppt of motn to modfy attachmnt ord, rply memo of

Docket Entries

Date		*Proceedings*
		P&A in suppt of motn to modify right to attach ord, prop ord modifying right to attach ord & denying applic for ord establshng procs regrding attachmnt, ex parte applic for spec hrg on motn for ord modifying right to attach ord, declar of Peter Strong, & various othr docs by hand delivry
	43.	Fld deft's ex parte applic for spec hrg on mtn for ord modifyng right to attach ord RTNBLE 5–19–80
	44.	Fld deft's declar of Peter H. Strong in suppt of ex parte applic for spec hrg of motn for ord modifyng rght to attach ord
5– 7–80	45.	Fld pltf's amd proof of serv of ord establishng proc regard attach
	46.	Fld pltf's suppl memo in oppos to mot to modfy right to attach ord & obj to evi
5– 7–80	47.	Fld deft's declar of Emiliano P. Reyes, Jr. in supp of mtn to modfy attachmnt ord
	48.	Fld deft's reply memo of P&A in supp of mt to modfy right to attach ord
5–7–80	49.	Fld pltf's ex parte applic & ORD allwing pltfs memo in oppos to mtn of Bank Saderat Iran for ord modifyng right to attach ord to be pl under seal
5– 8–80	50.	Fld ORD settng special hrg on mtn for ord modifyng right to attach rtnbl 5–12–80, 9AM

Docket Entries

Date		*Proceedings*
	51.	Fld rtn of sms, sevd Bank Melli Iran on 4–19–80
	52.	Fld pltf's notc of doc under seal
5– 9–80	53.	Fld deft's certif of svc of ord settng spec hrg on motn for ord modifyng right to attach ord by hand delivery
5–12–80	54.	Fld ORD establsh procs regardng attachmnt as stated w/in ORD
5–16–80	55.	Fld deft's Bank Saderat Iran ANSWER TO COMPLAINT
5–12–80	56.	MIN ORD: deft's Bank Saderat Iran motn for ord modifying right to attach ord is DENIED
5–30–80	57.	Fld defts Bank Melli Irans notc of motn to stay proceedngs; memo of P/A; affid of D. Levitt
6– 9–80	58.	Fld pltf's oppos of Dames & Moore to mtn to stay proceedngs
6–12–80	59.	Fld deft's respons to mtn to stay proceedngs
6–24–80		LODGED pltf's prop ord denying mtn to stay proceedngs
6–19–80		PLACED IN FILE NOT USED pltfs ex parte applic for ord allowng in camera filng of docs
		PLACED IN FILE NOT USED pltfs ord establshng procdrs regardng attachmnt
		PLACED IN FILE NOT USED pltfs ord modifyng right to attach ord

Docket Entries

Date		*Proceedings*
6–23–80	60.	MIN ORD: deft Bank Melli Iran's mot to stay DENIED
7– 8–80	61.	Fld pltf's decl of srv of cmplt, sms, & Farsi translations of same, srvd Bank of Tehran on 4–8–80; Atomic Energy Organization of Iran on 4–9–80; & Distributors Cooperative Credit Bank on 4–10–80
7–10–80	62.	Fld ORD denyng mtn to stay proceedngs
7–18–80	63.	Fld rtn of proof of serv summs & complt serv to The Bank of Iran on 4–80
7–23–80	64.	Fld Stip & ORD ext ti to respond to complt to 8–11–80
8–15–80	65.	Fld bank defts' ANSWER TO COMPLAINT
8–15–80	66.	Fld deft Atomic Energy Org's ANSWER TO COMPLAINT
8–15–80	67.	Fld deft Bank Markazi Iran's ntc of mot & mot to dism; rtnbl 9–15–80, 9 am; decl of Gordon J. Johnson in sppt of mot to dism
	68.	Fld deft Bank Markazi Iran's memo of P&As in sppt of its mot to dism
	69.	Fld deft Bank Markazi Iran's appendix to memo of P&As in sppt of its mot to dism
8–20–80	70.	Fld USA memo in supp of suggestn of interest, cpy of declar of G. William Miller
	71.	Fld USA suggestn of interest
8–28–80	72.	Fld Stip & ORD ext ti to respond to complt to 8–15–80 (R)

Docket Entries

Date		*Proceedings*
8–28–80		Fld docs lodgd UNDER SEAL
8–29–80	73.	Fld Stip & ORD that defts mtn to dism is cont to 10–20–80, 9 AM & pltfs oppos due 9–29–80
9–17–80	74.	Fld plf's ntc of tkng depos of Bank Markazi Iran, on 9–26–80
	75.	Fld stip & ORD ext briefing dt to 10–6–80
9–25–80	76.	Fld defts ntc of appear of attys.
	77.	Fld Crt's ORD re early meeting rqmts & PTC set for 1–19–81, 1:30 pm
	78.	Fld cert Bank defts' ntc of mot & mot, rtnble 10–20–80, 9 am, to dsm; memo of P/As
	79.	Fld dclrtn Koomer in partl opp to plf's ex parte app to cnt hrgs & briefing schd on mots to dsm
	80.	Fld deft Bank Markazi Iran's rsp to ex parte app for ord cntg hrgs & briefing schdl
		LODGED Only Not Used, plf's ex parte app for ord cntg hrgs & briefing schdls on mots to dsm; memo of P/As; dclrtn Howard; proposed ord
10–15–80	81.	Fld cert Bank defts' ntc of mot & mot, rtnble 11–24–80, 9am, to be excused frm early meeting rqmts pend determ of mot to dsm; memo of P/As.
10–14–80	82.	Fld ORD cntg mots to dsm to 1–19–81.

Docket Entries

Date		*Proceedings*
10–22–80	83.	Fld pltf stat rpt re early mtg of cnsl purs to ert ord of 9–25–80 decl of Wm C. Schweinfurth
	84.	Fld deft Bank Markazi Iran's suppl stat rpt re early mtg of cnsl
10–24–80	85.	Fld pltf notc of mot & mot for ord confrmng svc on certn defts & for ord grtng ti to sve govt of Iran; memo of p&a in suppt thereof; decl of Jeffrey M. Hamerling, retnbl 11–24–80, 9am
	86.	Fld pltf decl of svc on Bank Saderat Iran LODGED pltf prop ord confrmng svc on cert defts & grtng ext of ti to 5–24–81 to sve govt of Iran LODGE ONLY NOT USED.
10–27–80	87.	Fld deft Bank Markazi Iran cert of svc of suppl stat rpt of Bank Markazi Iran re early mtg of cnsl
10–29–80	88.	Fld plft notc of tkng depo of F. Sahabi, pres of Atomic Energy Org. of Iran on 11–12–80
	89.	Fld pltf notc of tkng depo of Dr. A.A. Nowroozi of Atomic Energy Org of Iran on 11–10–80
	90.	Fld pltf notc of tkng depo of Atomic Energy Org. of Iran on 11–17–80.
10–31–80	91.	Fld stmt of the US in fur suppt of its sugg of interest

Docket Entries

Date		*Proceedings*
11–7–80	92.	Fld deft Bank Markazi Iran memo of P&A in oppo to pltf's mot for ord that svc of complt be deemed made
	93.	Fld memo of P&A of certain bank defts in oppo to mot for ord confirmng svc.
11–12–80	94.	Fld Stip & ORD ext ti for deft Bank Markazi Iran & Commercial Bank to fi resp to pltf's mot for ord confirmng svc to 11–18–80
	95.	Fld pltf's memo w/respect to mot of certain bank defts to be excused frm early mtg requiremnt pndg determinatn of their mot to dism
11–18–80	96.	Fld pltf reply to memoranda in oppo to mot for ord confirming svc
11–24–80	97.	Fld deft Atomic Energy Org of Iran's joinder in oppo to mot for ord confrming svc
	98.	MIN ORD: Hrg on mot of certain bank defts to be excused frm early mtg requiremts pndg determination of their mot to dism; mot GRANTED.
12–1–80	99.	Fld pltf notc of mot & mot for an ord compellng certain defts to ans interrogs, prod docs & attend depos; memo of P&A; decls of Wm C. Schweinfurth & Jeffrey M. Hamerling in sppt thereof, rtnbl 12–30–80, 10 am, crtrm L.

Docket Entries

Date		*Proceedings*
		Fld pltf's exhs in sppt of oppo to mots to dism (auth sect)
		Fld pltf's exhs in oppo to mots to dism
	100.	Fld pltf's affs & decls in sppt of oppo to mots to dism
	101.	Fld pltf's memo of P&A in oppo to mots to dism of Bank Markazi Iran & certain bank defts, rtnbl 1–19–81, 9 am, crtrm 4. LODGED pltf prop Ord re svc of process. LODGE ONLY NOT USED.
12–3–80	102.	Fld pltf's amded decl of svc re oppo to mots to dism & spptng docs
12–4–80		LODGED pltf's prop ord re svc of process
12–2–80	103.	Fld bank defts' applic & ORD (LEW) allowng Michael S. Oberman to app as non-res atty, desig Michael D. Koomer as local cnsl.
	104.	Fld bank defts' applic & ORD (LEW) allowng Greg A. Danilow to app as non-res atty, desig Michael D. Koomer as local cnsl.
12–2–80	105.	Fld bank defts applic & ORD (LEW) allowng Daniel P. Levitt of Kramer, Levin, Nessen, Kamin & Soll, 919 Third Ave., New York, NY 10022 to app as non res atty & desig Michael D. Koomer as local cnsl.

Docket Entries

Date		*Proceedings*
12–4–80	106.	Fld ORD (LEW) of crt re assignmt of all fur dscvy mttrs to US Magistrate, ref to Mag. Penne. Cnsl ntfd.
12–5–80	107.	Fld ORD (P) re opposed mots & objs involvng depos & dscvy. Pltf's mot for ord compelling certain defts to ans interrogs fld 12–1–80 will be hrd 12–30–80, 10 am. Attys notified.
12–10–80	108.	Fld proof of srvce on Govt. of Iran.
12–15–80	109.	Fld certain bank defts memo of P&A in oppo to mot compel ans to interrogs & prod of docs.
12–16–80	110.	Fld Stip & ORD (LEW) re brfg sched on mot to dism of certain bank defts, reply due nlt 1–5–81.
	111.	Fld ORD (LEW) tht svc is confirmed as to defts Bank Melli Iran & Bank of Iran & the Middle East; defts Atomic Energy Org. of Iran, Bank Melli Iran, Bank of Tehran, & Distributors Cooperative Credit Bank; Bank Saderat Iran, except as set forth, mot confirming svc DENIED. Any deft not yet svd (othr than deft State & Govt of Iran) may be svd purs to alt svc proc set forth in Judge Duffy's opinion & ord in New England Merchants Natl Bank v. Iranian Power & Transmission Co, 79 Civ 6380 (KTD) (S.D.N.Y.) 6–4–80

Docket Entries

Date		*Proceedings*
	112.	Fld deft Atomic Energy Organization of Iran's memo of P&A in oppo to Pltf's mot to compel attendance at depo; rqst for prot ord; decl of Wm W. Schofield
12–15–80	113.	Fld deft Bank Saderat Iran memo of P&A in oppo to mot to compel dscvy.
12–24–80	114.	Fld deft Bank Saderat Iran stip w/ Dames & Moore re pltf mot to compel dscvy
12–16–80	115.	Fld Stip & ORD (P) ext ti for deft Bank Saderat Iran to sve & fi oppo to pltf mot to compel certn defts to ans interrogs, etc to 12–15–80 & ti for pltf to fi its reply to 12–22–80
12–30–80	116.	Fld ltr frm Tuttle & Taylor to Mag. Penne, dtd 12–23–80.
	117.	Fld ltr frm Pacht, Ross, Warne, Bernhard & Sears, Inc. to Mg. Penne, dtd 12–24
	118.	Fld pltf decl of Jeffrey M. Hamerling re svc of sms & complt.
1–2–81	119.	Fld pltf rqst for clarificatn of ord re PTC
1–5–81		LODGED pltf's prop ord
12–30–80	120.	MIN ORD: Hrg on pltf's mot to compel dscvy held. Crt ORDS tht Dr. A.A. Nowroozi & F. Sahabi of Atomic Energy Org of Iran attend depos as noted by plt in London, England. Rqst of Atomic Energy Org tht pltf

Date	*Proceedings*
	pay cost of transportatn DENIED; person desig by Atomic Energy Org of Iran to testify on mttrs described in notc of tkng depo svd 10–29–80 shll attend depo in London as noted by pltf; deft Bank Saderat Iran shll meet & confer for purp of resolvng iss & pltf shll have right to fi mot to compel dscvy in acc w/L/R 3.15 if agreemt not reached; w/resp to certain bank defts, cnsl shll meet & conf for pur of resolvng iss pltf shall have right to sve new interrogs cov iss on which they are unable to agree. Cnsl to meet on 1–6–81 & pltf has to 1–8–81 to fi mot to compel dscvy. Cnsl for certn bnk dfts have to 1–12–81 to fi oppo & hrg on such mot, if any, set for 1–14–81, 10 am; & fur ORD tht cnsl for pltf shll prep crt's frml ord in acc w/L/R 7(a).
1–5–81	121. Fld deft Bank Markazi Iran aff of Gorden J. Johnson & exhs to reply memo of P&A in sppt of its mot to dism.
1–5–81	122. Fld deft Bank Markazi Iran reply memo of P&A in sppt of its mot to dism.

Docket Entries

Date		*Proceedings*
	123.	Fld pltf's notc of tkng depo of Mr. F. Sahabi, Pres of Atomic Energy Org of Iran on 1-15-81.
	124.	Fld pltf's notc of tkng depo of the Atomic Energy Org. of Iran on 1-16-81.
	125.	Fld pltf's decl of svc of notcs of tkng depo.
	126.	Fld pltf's notc of tkng depo of Dr. A. A. Nowroozi of Atomic Energy Org. of Iran on 1–14–81.
1–6–81	127.	Fld certain bank defts reply memo of P&A in sppt of mot to dism
1–8–81	128.	Fld pltf's notc of motn & motn to compel ans to interrogs & reqs for productn of docs retnbl 1-14-81, 10 AM; memo of P&As; declaratn of Jeffrey M. Hamerling in suppt thereof
1–9–81	129.	Fld suppl memo & aff in sppt of U.S.'s suggestion of int.
	130.	Fld Stip & Ord (LEW) ext ti for deft Bank Markazi Iran to file & sve reply to pltf's oppo to mot to dism to 1-5-81.
	131.	Fld Stip & Ord (LEW) ext ti for deft Islamic Republic of Iran to ans or resp to complt to 2–3–81.
1–12–81	132.	Fld certain bank defts memo of P&A in oppo to mot to compel ans to interrogs & prod of docs

Docket Entries

Date		*Proceedings*
1–12–81	133.	Fld memo of P/A of certain Bank defts in opp to mot to compel ans to interogs & prod of docs
1–13–81	134.	Fld pltfs reply memo in suppt of pltfs mot to compel discov
	135.	Fld certification of duplicate recording of procs had bf mag on the 12-30-80
	136.	Fld pltfs supplm memo of P/A of pltf Dames & Moore in opp to mots to dism of Bank Markazi Iran & of certain Bank defts declar of J. M. Hamerling
1–14–81	137.	Fld prae of 1 cassette recording of procs bf Mag. Penne on 12-30-80
	138.	MIN ORD: Hrg on pltf's mot to compel dscvy held. Crt ORDS certain bank defts to sve on pltf on or bef 2-13-81 any objectns to spec interrogs & rqst to prod docs, pltf & certain bnk defts to meet & conf on or bef 2-17-81 to resolve or narrow objectns by certain bnk defts; tht if prtys are unable to resolve all of objectns by stip, pltf shll file new mot to compel & stip reqd by L/R 3.15 on or bef 3-3-81. Hrg on mot to compel set for 3-12-81, 10 am & fur ORD tht pltf's cnsl prep fml ord.
1–14–81	139.	Fld ORD (P) re dscvy mttr. W/respct to AEOI, mot to compel attndnce at depos GRANTED, Pltf has right to proceed w/ dscvy w/respct to BSI, & shll meet w/cnsl for certain bank defts. Pltf's mot for relief frm Rule 3.15 grtd.

Docket Entries

Date		*Proceedings*
1–15–81	140.	Fld ORD (P) re dscvy mttr (#2) tht pltf has right to conduct dscvy on jurisdctl facts, certain bank defts to sve pltf on or bef 2-13-81 objectns to spec interrogs & rqsts for prod of docs, prtys to meet & confr on or bef 2-17-81 purs to L/R 3.15, If certn bank defts objectns are unresolved by stip, pltf shll fi new mot to compel w/stip on or bef 3-3-81, hrg to be held 3-12-81, crtrm L.
1–16–81	141.	Fld pltf's notc of mot & mot for cont of PTC set for 1-19-81; memo of P&A in sppt thereof, rtnbl 1-19-81, 9 am.
	142.	Fld ORD (LEW) shrtng ti re mot for cont of PTC
	143.	Fld pltf's ex parte applic for ord shrtng ti re mot for cont of PTC; memo of P&A in sppt thereof
1–19–81	144.	MIN ORD: Certn bnks' mot to dism submittd. PTC contd to 5–18–81, 1:30 pm.
1–21–81		LODGED pltf's prop ord grtg pltf's mot to cont PTC
	145.	Fld pltf's decl of svc of ord.
	146.	Fld pltf's decl of svc of ord.
1–20–81	147.	Fld applic & ORD (LEW) allowng Simon Taylor to app as non-res atty & desig Peter H. Strong as local cnsl. for Bank Markazi Iran.

Docket Entries

Date		*Proceedings*
1–20–81	148.	Fld ORD (LEW) den. mots to dsm of defts Bank Markazi Iran & certn bnk defts
1–27–81	149.	Fld pltf's notc of mot & mot for S/J agnst defts Atomic Energy Org. of Iran; notc of mot & mot to prohibit intro of evid; memo of P&A in sppt thereon; rtnbl 2–17–81, 9am.
	150.	Fld pltf's decl of Robert M. Perry.
	151.	Fld pltf's aff of Robert R. Blickwedehl.
	152.	Fld pltf's decl of Jeffrey M. Hamerling.
		LODGED pltf's prop fndgs of fact & concls of law.
		LODGED pltf's prop S/J. LODGE ONLY NOT USED.
1–28–81	153.	Fld ORD (LEW) grtg pltf's mot to cont PTC to 5–18–81, 1:30 pm.
2–3–81	154.	Fld defts Islamic Republic of Iran & Atomic Energy Org of Iran's ex parte app for ord cntg hrg on pltf's mot for S/J; decl of Wm. W. Schofield.
		LODGED defts' prop ex parte ord cntg hrg dte on mot for S/J.
1–29–81	155.	Fld USA's stmt of int
2–3–81	156.	Fld deft Islamic Republic of Iran's ANSWER TO COMPLAINT.
	157.	Fld pltf's memo in oppo to ex parte applic for ord cntg hrg on pltf's mot for S/J.
2–4–81	158.	Fld rtn receipt frm Industrial Credit Bank, Ateshkaden Ave., Tehran, Iran, cert. No. 1781188, 4–8–80.

Docket Entries

Date		*Proceedings*
	159.	Fld deft Atomic Energy Org. of Iran notc of mot to reconsidr & vac dscvy ord & for relief frm L/R 3.15; memo of P&A; decl of Wm. W. Schofield, rtnbl 3–16–81, 9 am.
2–6–81	160.	Fld defts ex parte prop ord. cntg hrg dte on pltf's mot for S/J, DENIED by LEW
	161.	Fld deft's Atomic Energy Organization of Iran notc of chg of hrg dte (Dscvy mttr) to 3–16–81, 9 am.
2–18–81	162.	Fld pltf's fndgs of fact & concls of law (LEW).
	163.	Fld Judgmt & ORD (LEW) grtg pltf's mot for S/J agnst defts Atomic Energy Org. of Iran & State & Govt of Iran. Pltf shll hv jdgmt agnst said defts in amt of $3,788,930.79 (which incl interest to 1–31–81 at contract rte of 6% in amt of $351,377.77) + int after 1–31–81 at 6% in amt of $565. per day. (ENT 2–18–81) Mld cpys & notc to prtys. Crtfd 10 cpys to pltf
2–19–81	164.	Fld pltf's notc of tking depo of deft Bank Saderat Iran on 2–23–81.
3–9–81	170.	Fld pltf's notfctn of clerical error re dscvy mot fld 3-3-81.
3–10–81	171.	Fld certn bank defts memo of P&A in oppo to mot to cmpl.

Docket Entries

Date		*Proceedings*
3–12–81	172.	MIN ORD: Hrg on pltf's mot to cmpl dscvy fld 3-3-81. Crt hrs stmts of cnsl & (P) govt's arg in sppt of rqst to stay procdngs, denying said rqst. & grtg mot to cmpl. Crt ORD that interrogs be ans & docs be prod on or bf 4-1-81. Crt fur ORD tht pltf's mot for sanctns is denied; tht if pltf has objectns to ans specific interrogs or producing specif docs fur dscvy shll be exped by grtg pltf til 4-7-81 to fi mot to cmpl, grtg defts til 4–13–81 to oppose mot, w/hrg on mot to be set for 4-17-81, 10 am & fur ORD tht defts shll be required by 4-1-81 to ans any interrog & to prod any doc which specific objectn is not tkn; cnsl for pltf to prep Crt's frml ord in accord w/L/R 7(a). Cpy to LEW
3–13–81	173.	Fld pltf's memo in oppo to mot to reconsid & vacate discvy ord.
3–18–81		LODGED pltf's prop ord
	174.	Fld pltf's decl of Delilah A. Phiefer re svc of sms & cmplt
3–20–81	175.	Fld deft's NOTC OF APPEAL to 9th Cir C/A frm Jdgmt ent 2–18–81 $70.00 fldng & docket fees pd.
3–18–81	176.	Fld ORD (P) tht defts Bank Melli Iran, the Bank of Iran & the Middle East, Bank of Tehran & Distributors Cooperative Credit Bank ans interrogs on or bf 4-1-81 & prod

Docket Entries

Date		*Proceedings*
		docs; pltf may file mot cmplg dscvy as to any interrogs unans or docs not produced on or bf 4-7-81. Certain bnk defts shll fi their oppo on or bf 4-13-81. Hrg on said mot to be hld 4-17-81, 10 am, Crtrm L.
3–30–81	177.	Fld Appellants' ntc of rqst to prep & file Reporter's trans of prcdngs.
3–25–81	178.	Fld ORD the mot deft AEOI is Denied.
4–1–81	179.	Fld Bank defts' rsp to dscvry.
4–7–81	180.	Fld plf's ntc of mot & mot, rtnble 4/17/81, 10 am, to ent dflt jdgmt, or in alt for other sanctions, etc.
4–13–81	181.	Fld pltf's x-desig of rptr's transcr
	182.	Fld certain bank defts memo of P&A in oppo to mot to enter dflt jdgmt.
4–14–81	183.	Fld cert Bank defts' proof of servc of memo of p/a.
4–15–81	184.	Fld pltf's reply memo in suppt of motn to enter default jdgmt, or alternatively for other sanctions purs to Rule 37
3–12–81	185.	Corrected MIN ORD: Hrg on pltf's mot to cmpl dscvy fld 3-3-81 (#3). Crt hrs stmts of cnsl & govt's arg in suppt of rqst to stay procdngs & denies rqst. Crt GRTS motn to cmpl & ORD tht interrogs be ans & docs prod on or bf 4-1-81; fur ORD tht pltf's mot for sanctns is DENIED; tht if defts hv objectns to ans'g spec interrogs

Docket Entries

Date		*Proceedings*
		or prod of docs, furthr dscvy shll be expedited by grtg pltf to 4–7–81 to fi mot to compl, defts to 4–13–81 to oppose, w/hrg on mot set for 4–17–81, 10 am; fur ORD tht defts shll be rquired by 4–1–81 to ans any interrog & to prod any doc to which specific objectn is not tkn. & Fur ORD tht pltf's cnsl prep Crt's frml ord
4–23–81		LODGED certain bank defts prop ord on dscvy mttr.
4–17–81	186.	MIN ORD: Hrg on pltf's motn for sanctns, DENIED & govt's rqst to stay procdng Crt ORDS cnsl for defts to prep frml ord
4–23–81	187.	Fld Notc of flg of Mag's R&R & the lodgng of prop jdgmt
	188.	Fld R&R (P) tht jdgmt by deflt be ent in fav of pltf & agnst certain bnk deft
	189.	Fld certain bnk defts proof of svc of prop ord on dscvy mttr
5–6–81	190.	Fld certain bank defts stmt of objectns to prop fndgs & recom of Mag. Penne to ent deflt jdgmt; & memo of P&A in suppt thereof
	191.	Fld ORD (P) re dscvy mttr, denying pltf's motn for monetary sanctns.
5–8–81	192.	Fld certain bnk defts suppl auth in suppt of stmt of objectns to prop fndgs & recomm of Mag. Penne to ent deflt jdgmt

Docket Entries

Date		*Proceedings*
	193.	Fld certain bnk defts notc of motn to reconsid prop fndgs & recommendatns of Mag. Penne to ent deflt jdgmt; & stmt of objectns to prop fndgs & memo of P&A in suppt thereof, rtnbl 6-15-81, 9 am.
5–13–81	194.	Fld Stip & Ord (LEW) allowng intrventn by Govt & shrtng ti for notc of motn to stay jdgmt of 2-18-81 to 5-21-81, 9 am, to be fld on or bef 5-11-81.
5–8–81	195.	Fld special auth in suppt of stmt of objectns of certain bank defts to prop fndgs & recomm of Mag. Penne to ent deflt jdgmt
5–13–81	196.	Fld intervenor USA's notc of motn & motn to stay jdgmt, rtnbl 5–21–81.
5–7–81	197.	Fld USA's suggestion of intrst re stay of 2-18-81 jdgmt
5–18–81	198.	Fld pltf's memo in oppo to motn of U.S. to stay execution of jdgmt
	199.	Fld defts Atomic Energy Org of Iran & Islamic Republic of Iran's notc of joind in motn to stay enforcement of jdgmt

Complaint of Plaintiff Dames & Moore for Breach of Contract, Account Stated, and Work, Labor and Materials

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 79-04918 LEW (Px)

DAMES & MOORE, a partnership,

Plaintiff,

vs.

ATOMIC ENERGY ORGANIZATION OF IRAN, STATE AND GOVERNMENT OF IRAN, BANK MELLI IRAN, INDUSTRIAL CREDIT BANK, INDUSTRIAL AND MINING DEVELOPMENT BANK OF IRAN, INTERNATIONAL BANK OF IRAN, AGRICULTURAL DEVELOPMENT BANK OF IRAN, BANK MARKAZI IRAN, BANK OF TEHRAN AGRICULTURAL COOPERATIVE BANK OF IRAN, BANK BAZARGANI IRAN, BANK BIMEH IRAN, BANK IRANSHAHR, BANK DARIUSH, BANK KAR, THE BANK OF IRAN AND THE MIDDLE EAST, BANK OF OMRAN, BANK PARS, BANK RAFAH KARGARAN, BANK SADERAT IRAN, BANK SAKHTEMAN, BANK SANAYE IRAN, BANK SEPAH, BANK SHAHRYAR, BANQUE ETEBARATE IRAN, DEVELOPMENT AND INVESTMENT BANK OF IRAN, DISTRIBUTORS COOPERATIVE CREDIT BANK, THE FOREIGN TRADE BANK OF IRAN, IRANIANS' BANK, MORTGAGE BANK OF IRAN,

Defendants.

Plaintiff Dames & Moore, a partnership ("Plaintiff"), for its Complaint against defendants hereby alleges as follows:

Complaint of Plaintiff Dames & Moore for Breach of Contract, Account Stated, and Work, Labor and Materials

PRELIMINARY ALLEGATIONS

1. Plaintiff is a general partnership doing business in several states of the United States and in several foreign countries, with principal offices located in Los Angeles, California. Plaintiff is engaged generally in the business of environmental and earth science consulting.

2. Defendant Atomic Energy Organization of Iran ("AEOI") is an agency and instrumentality of the State and Government of Iran as defined under 28 U.S.C. § 1603 (b) and, as such, is a foreign state as defined under 28 U.S.C. § 1603(a); AEOI is not a citizen of the State of California.

3. Defendant State and Government of Iran ("Iran") is a foreign state as defined under 28 U.S.C. § 1603(a).

4. Plaintiff is informed and believes, and based on such information and belief alleges, that defendants Bank Melli Iran, Industrial Credit Bank, Industrial and Mining Development Bank of Iran, International Bank of Iran, Agricultural Development Bank of Iran, Bank Markazi Iran, Bank of Tehran, Agricultural Cooperative Bank of Iran, Bank Bazargani Iran, Bank Bimeh Iran, Bank Iranshahr, Bank Dariush, Bank Kar, The Bank of Iran and The Middle East, Bank of Omran, Bank Pars, Bank Rafah Kargaran, Bank Saderat Iran, Bank Sakhteman, Bank Sanaye Iran, Bank Sepah, Bank Shahryar, Banque Etebarate Iran, Development and Investment Bank of Iran, Distributors Cooperative Credit Bank, The Foreign Trade Bank of Iran, Iranians' Bank, and Mortgage Bank of Iran, are either agencies or instrumentalities of Iran and, as such, are

foreign states as defined under 28 U.S.C. § 1603(a); said defendants are not citizens of the State of California.

5. Defendants are not immune from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611, because of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, 8 U.S.T. 899 (1957), and because of the commercial nature of the activity of defendants that gives rise to this action and the acts, and direct effects of acts, of the defendants in the United States.

6. Defendants are foreign states and agencies or instrumentalities of foreign states, not immune from suit, and jurisdiction is conferred on this Court by 28 U.S.C. § 1330 (a).

7. Diversity of citizenship exists between the parties and the amount in controversy exceeds $10,000 exclusive of interest and costs; jurisdiction is, therefore, also conferred on this Court by 28 U.S.C. § 1332.

8. Venue is proper in this judicial district under 28 U.S.C. § 1391 because the Plaintiff resides in this judicial district, the defendants are aliens, a substantial part of the events and omissions giving rise to Plaintiff's claims occurred in this district, and, Plaintiff is informed and believes, defendants are doing business in this district.

9. At all times mentioned herein, AEOI was the agent and representative of Iran and, in doing the things hereinafter alleged, was acting within the scope of such agency.

Complaint of Plaintiff Dames & Moore for Breach of Contract, Account Stated, and Work, Labor and Materials

10. Plaintiff is informed and believes, and based on information and belief alleges, that there exists, and at all times material hereto has existed, a unity of interest and ownership between Iran and all other defendants referred to above, such that any individuality and separateness between these entities have ceased and each of said defendants is the alter ego of Iran. Adherence to the fiction of separate existence of these defendants would promote injustice in that it would allow AEOI and Iran to wrongfully avoid the payment of their just obligations to Plaintiff.

11. Plaintiff owns, of record or beneficially, all of the equity in Dames & Moore International, S.R.L., a Venezuelan limited liability company ("Dames").

12. Dames is a party to a written contract with AEOI concerning site studies for a proposed nuclear power plant in Iran (the "Contract"). The Contract succeeded a prior Letter of Intent between the same parties dated July 16, 1977 (the "Letter of Intent").

13. Dames has assigned all of its right, title and interest under the Contract and the Letter of Intent to Plaintiff.

14. Plaintiff brings this action as assignee of Dames and, being the sole owner of Dames, as the real party in interest in any dispute between Dames and the defendants. For convenience the term "Plaintiff" is used hereafter in this Complaint to include both Plaintiff Dames & Moore and its wholly-owned affiliate Dames & Moore International, S.R.L.

Complaint of Plaintiff Dames & Moore for Breach of Contract, Account Stated, and Work, Labor and Materials

FIRST CAUSE OF ACTION

(Breach of Contract)

15. Plaintiff incorporates herein by reference the allegations of Paragraphs 1 through 14 hereof.

16. On or about July 16, 1977, Plaintiff and AEOI entered into the Letter of Intent.

17. On or about December 8, 1977, Plaintiff and AEOI entered into the Contract, which superseded the Letter of Intent.

18. The Contract (and the superseded Letter of Intent) between Plaintiff and AEOI provided, *inter alia*, as follows:

a. Plaintiff agreed to perform certain site validation studies and certain other professional services in connection with a proposed nuclear power plant to be constructed by, or on behalf of, AEOI;

b. AEOI agreed to pay Plaintiff certain charges for said services in response to invoices to be rendered by Plaintiff; the specific charges payable were set forth in the Contract;

c. Any of Plaintiff's invoices, not disapproved by AEOI within sixty (60) days, were deemed approved; and

d. Plaintiff's approved invoices would bear interest at the rate of six percent (6%) per annum after one hundred five (105) days.

19. In accordance with the terms of the Contract and Letter of Intent, during the period July 16, 1977 to June 30,

1979, Plaintiff performed services for AEOI and rendered to AEOI invoices setting forth the amounts due for such services under and in accordance with the terms of the Contract.

20. For services rendered during said period, Plaintiff submitted invoices to AEOI (net of credit invoices) for services performed under the Contract totalling $7,090,-831.19. Of this sum, $3,654,136.89 has been paid; and $3,436,694.30 remains unpaid.

21. Of the $3,436,694.30 which remains unpaid under the Contract, AEOI has disapproved $1,347,767.24. The remaining $2,088,927.06 has been approved (or was first disapproved and later approved) but has not been paid.

22. In disapproving $1,347,767.24 of Plaintiff's invoices, AEOI acted unreasonably, arbitrarily, capriciously, and without any justification. Plaintiff's services reflected in said invoices were properly rendered and billed in accordance with contract rates; and their reasonable value was no less than the amounts billed.

23. On June 30, 1979, AEOI sent notice of termination of the Contract to Plaintiff. (The Contract provided that it could be terminated at any time by AEOI for its own convenience.) Certain costs of termination, authorized under the contract to be billed to AEOI, are included in the invoice amounts set forth in Paragraphs 20 and 21 above.

24. Plaintiff has demanded of AEOI that it pay all outstanding invoices of Plaintiff, as well as interest there-

on as provided in the Contract. In addition, Plaintiff has demanded of AEOI that it pay certain costs in excess of $40,000 incurred by Plaintiff in defending against a meritless warranty claim asserted against Plaintiff. Under the Contract, Plaintiff is entitled to be reimbursed for said costs.

25. AEOI has breached the Contract by failing and refusing and continuing to fail and refuse to pay the amounts due under the Contract as set forth above.

26. Plaintiff has performed all covenants, conditions, and promises required of it on its part to be performed under the Contract in accordance with the terms and conditions thereof.

27. By letter dated July 23, 1979, revised August 1, 1979, Plaintiff requested, as provided in the Contract, a meeting with AEOI within thirty (30) days for purposes of agreeing on a final settlement of all matters relating to the Contract. AEOI has continually postponed said meeting and obviously does not intend that it take place.

28. As a direct and proximate result of AEOI's breaches of the Contract, Plaintiff has suffered damages, as of December 1, 1979, in the amount of $3,584,188.87, consisting of (1) $3,436,694.30 in unpaid invoices for services, (2) $107,494.57 in interest on approved but unpaid invoices (except for ten percent of certain of such invoices, which ten percent AEOI was entitled to defer paying until the end of the Contract) at the contractual rate of 6% per annum from one hundred five (105) days after submission of each invoice until December 1, 1979, and (3) $40,000 in

unreimbursed costs to defend the meritless warranty claim referred to in Paragraph 24 above.

29. Interest on Plaintiff's unpaid invoices (including the ten percent deferrals now due) at the contractual rate of 6% accrues after December 1, 1979, at a rate of $564.94 per day.

30. Plaintiff is entitled to recover judgment from defendants, and each of them, for the damages set forth in Paragraphs 28 and 29 hereof.

SECOND CAUSE OF ACTION

(Account Stated)

31. Plaintiff hereby incorporates by reference herein Paragraphs 1 through 30 hereof.

32. By invoices and correspondence between November 5, 1977 and August 1, 1979, accounts were stated in writing between Plaintiff and AEOI, on the basis of which there was found due and owing from AEOI to Plaintiff the sum of $7,189,329.44, of which sum AEOI has paid $3,654,136.89 and of which $3,535,192.55 remains unpaid.

33. Plaintiff has requested that AEOI pay said sum, but AEOI has not paid the same and refuses to do so.

34. There is now due, owing, and unpaid to Plaintiff from AEOI and the other defendants herein the sum of $3,535,192.55 plus prejudgment interest at the legal rate.

Complaint of Plaintiff Dames & Moore for Breach of Contract, Account Stated, and Work, Labor and Materials

THIRD CAUSE OF ACTION

(Work, Labor, and Materials)
(Agreed Price)

35. Plaintiff incorporates herein by reference Paragraphs 1 through 30 hereof.

36. Within four years last past, AEOI became indebted to Plaintiff in the sum of $3,436,694.30 for professional services rendered and materials furnished by Plaintiff to AEOI at the special instance and request of AEOI, and for which AEOI agreed to pay said sum, which sum was reasonable.

37. No part of said sum has been paid; demand therefor has been made by Plaintiff and refused by AEOI, and there is now due, owing, and unpaid to Plaintiff from AEOI and the other defendants herein the sum of $3,436,694.30 plus prejudgment interest at the legal rate.

FOURTH CAUSE OF ACTION

(Work, Labor, and Materials)
(Reasonable Value)

38. Plaintiff incorporates herein by reference Paragraphs 1 through 30 hereof.

39. Within four years last past, AEOI became indebted to Plaintiff in the sum of $3,436,694.30 for professional services rendered and materials furnished by Plaintiff to AEOI at the special instance and request of AEOI, for

which AEOI agreed to pay a reasonable sum. $3,436,694.30 is a reasonable sum for said services and materials.

40. No part of said sum has been paid; demand therefor has been made by Plaintiff and refused by AEOI, and there is now due, owing, and unpaid to Plaintiff from AEOI and the other defendants the sum of $3,436,694.30 plus prejudgment interest at the legal rate.

WHEREFORE, Plaintiff prays for judgment against defendants as follows:

1. For judgment on Plaintiff's first cause of action in the amount of $3,584,188.87 plus contractual interest at the rate of $564.94 per day for each day from December 1, 1979 to the date of judgment herein;

2. For judgment on Plaintiff's second cause of action in the amount of $3,535,192.55 plus prejudgment interest at the legal rate;

3. For judgment on Plaintiff's third cause of action in the amount of $3,436,694.30 plus prejudgment interest at the legal rate;

4. For judgment on Plaintiff's fourth cause of action in the amount of $3,436,694.30 plus prejudgment interest at the legal rate;

5. For costs of suit; and

6. For such other and further relief as this Court deems just and proper.

Dated: December 17, 1979

TUTTLE & TAYLOR, Incorporated
MERLIN W. CALL
C. STEPHEN HOWARD
JEFFREY M. HAMERLING

/s/ C. STEPHEN HOWARD
C. Stephen Howard, *a member of the law firm of Tuttle & Taylor Incorporated, Attorneys for Plaintiff*

Complaint of Plaintiff Dames & Moore for Breach of Contract, Account Stated, and Work, Labor and Materials

VERIFICATION

STATE OF CALIFORNIA

County of Los Angeles

I, the undersigned, say:

I have read the foregoing complaint of Plaintiff Dames & Moore for Breach of Contract, Account Stated, and Work, Labor, and Materials and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☒ I am ☐ an officer ☒ a partner ..... ☐ a .....
..... of Dames & Moore .....
.....
a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

☐ I am one of the attorneys for .....
....., a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason: I am informed and believe and on that ground allege that the matters stated in it are true.

Executed on December , 1979, at Los Angeles, California.

Complaint of Plaintiff Dames & Moore for Breach of Contract, Account Stated, and Work, Labor and Materials

I declare under penalty of perjury that the foregoing is true and correct.

JAMES B. THOMPSON
(Signature)

Excerpts from Agreement Dated December 8, 1977

CONTRACT FOR

SITE VALIDATION AND

ENVIRONMENTAL STUDIES

BETWEEN

ATOMIC ENERGY ORGANIZATION OF IRAN

AND

DAMES & MOORE INTERNATIONAL, S.R.L.

THIS AGREEMENT, made and entered into this 8th day of December, 1977 by and between the Atomic Energy Organization of Iran ("AEOI") an agency of the Imperial Government of Iran, having its head office at Zahed Avenue, Tehran, Iran, as party on the one part and Dames & Moore International, S.R.L. ("Consultant") registered in Tehran, Iran with the registration number 445, having its head office at Vanak, Molla Sadra St., No. 7, Shiraz St., Tehran, Iran, as party on the other part.

• • •

2.3 *Place of Performance*

The Services shall be partly performed in Iran and partly outside Iran.

Consultant shall do its best to perform as much of the Services as possible in Iran, and shall use its facilities outside Iran only when necessary.

• • •

Excerpts from Agreement Dated December 8, 1977

IN WITNESS WHEREOF, the parties hereto have offered their signatures and seals:

ATOMIC ENERGY ORGANIZATION OF IRAN

By: A. A. NOWROOZI

DAMES & MOORE INTERNATIONAL S.R.L.

By: YAHYA ESKANDARI

Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-04918 LEW (Px)

DAMES & MOORE, a partnership,

Plaintiff,

vs.

ATOMIC ENERGY ORGANIZATION OF IRAN, STATE AND GOVERNMENT OF IRAN, BANK MELLI IRAN, INDUSTRIAL CREDIT BANK, INDUSTRIAL AND MINING DEVELOPMENT BANK OF IRAN, INTERNATIONAL BANK OF IRAN, AGRICULTURAL DEVELOPMENT BANK OF IRAN, BANK MARKAZI IRAN, BANK OF TEHRAN AGRICULTURAL COOPERATIVE BANK OF IRAN, BANK BAZARGANI IRAN, BANK BIMEH IRAN, BANK IRANSHAHR, BANK DARIUSH, BANK KAR, THE BANK OF IRAN AND THE MIDDLE EAST, BANK OF OMRAN, BANK PARS, BANK RAFAH KARGARAN, BANK SADERAT IRAN, BANK SAKHTEMAN, BANK SANAYE IRAN, BANK SEPAH, BANK SHAHRYAR, BANQUE ETEBARATE IRAN, DEVELOPMENT AND INVESTMENT BANK OF IRAN, DISTRIBUTORS COOPERATIVE CREDIT BANK, THE FOREIGN TRADE BANK OF IRAN, IRANIANS' BANK, MORTGAGE BANK OF IRAN,

Defendants.

~~[Proposed]~~ *LEW*

The Motion of Plaintiff Dames & Moore ("Plaintiff") for Summary Judgment against Defendants Atomic Energy

Findings of Fact and Conclusions of Law

Organization of Iran ("AEOI") and State and Government of Iran ("Iran") having come on for hearing on Tuesday, February 17, 1981, at 9:00 a.m. and the Court having considered the papers filed by the parties and having heard the arguments of counsel; and the Court having granted said motion, the Court now makes the following findings of fact and conclusions of law in connection therewith:

FINDINGS OF FACT

1. Plaintiff is a general partnership doing business in several states of the United States and in several foreign countries, with principal offices located in Los Angeles, California. Plaintiff is engaged generally in the business of environmental and earth science consulting.

2. The AEOI is an agency and instrumentality, and an agent, of Iran. In doing the acts herein, the AEOI acted as an agent of Iran.

3. The AEOI was served with process in this action on June 8, 1980, by compliance with this Court's Order regarding alternative service dated April 3, 1980, issued under 28 U.S.C. Section 1608(b)(3)(C).

4. Iran was served with process in this action on or about September 23, 1980, under the provisions of 28 U.S.C. Section 1608(a)(4).

5. The acts of the AEOI and Iran upon which this action is based were in connection with commercial activities of the AEOI and Iran and caused direct effects in the United States.

6. A substantial part of the events or omissions giving rise to Plaintiff's claims herein occurred in the Central District of California.

7. The United States terminated diplomatic relations with Iran on April 7, 1980, ~~and currently does not recognize any government in Iran.~~ *LEW*

LEW

8. No properly credentialed diplomatic representative of Iran has asserted any claim of immunity in this action on behalf of the AEOI or Iran.

9. Plaintiff owns and controls Dames & Moore International, S.R.L., a Venezuelan limited liability company ("Dames"). From 1964 to 1979 Plaintiff did business with Iran, including the business that is the subject of this action, through Dames.

10. On or about July 16, 1977, the AEOI and Plaintiff, through Dames, entered into a Letter of Intent.

11. On or about December 8, 1977, the AEOI and Plaintiff, through Dames, entered into a written contract (the "Contract") on the same subject, which superseded the Letter of Intent.

12. Plaintiff was the real party in interest in negotiating and performing the Contract (and the Letter of Intent) and in bearing the burden of its breach and is referred in these findings as the contracting and performing party.

13. On November 30, 1979, Dames assigned to Plaintiff all of Dames' claims arising out of work done for the AEOI.

14. The Contract between Plaintiff and the AEOI provided, *inter alia*, as follows:

a. Plaintiff agreed to perform certain site validation studies and certain other professional services in connection with a proposed nuclear power plant to be constructed by, or on behalf of, the AEOI (Section 2.1);

b. The AEOI agreed to pay Plaintiff certain charges for said services in response to invoices to be rendered by Plaintiff; the specific charges payable were set forth in the Contract (Section 8.1);

c. Any of Plaintiff's invoices, not objected to by the AEOI within sixty (60) days, were deemed approved (Section 8.2.3.1); and

d. Plaintiff's approved invoices would bear interest at the rate of six percent (6%) per annum after one hundred five (105) days (Section 8.2.3.2).

15. During the period July 16, 1977 to June 30, 1979, Plaintiff performed services, and incurred costs, for the AEOI in accordance with the terms of the Contract and the Letter of Intent. From time to time Plaintiff rendered invoices to the AEOI, setting forth the amounts due for such services and costs under, and in accordance with, the terms of the Contract.

16. For services rendered and costs incurred under the Contract and Letter of Intent during said period, Plaintiff submitted invoices to AEOI (net of credit invoices) totalling $7,090,831.19. Of this sum, $3,653,278.17 has been paid by the AEOI; and $3,437,553.02 remains unpaid.

17. Of the $3,437,553.02 which remains unpaid under the Contract, AEOI has objected to items totalling

$1,347,767.24. The other $2,089,785.78 was approved by the AEOI or deemed approved under the Contract (or was first objected to and later approved) but still has not been paid.

18. In objecting to $1,347,767.24 of Plaintiff's invoices, the AEOI acted without cause. Plaintiff's services and costs reflected in said invoices were properly rendered and incurred and were billed in accordance with the Contract rates. Their reasonable value was no less than the amounts billed.

~~19. Plaintiff also incurred costs in excess of $40,000 in defending against a meritless warranty claim asserted against Plaintiff by the AEOI.~~ *LEW*

20. Section 10.2 of the Contract provided that Plaintiff's cost of defending a meritless warranty claim by the AEOI would be borne by the AEOI.

21. Section 9.2.3 of the Contract provided that the AEOI could terminate the Contract for its own convenience at any time.

22. On June 30, 1979, the AEOI sent notice of termination of the Contract to Plaintiff. Certain costs of termination, authorized under Section 9.6 of the Contract to be billed to the AEOI, are included in the invoice amounts set forth in the findings above.

23. Plaintiff has demanded payment of its outstanding invoices plus interest and reimbursement of its warranty defense costs.

24. The AEOI has failed and refused to pay the amounts due under the Contract as set forth above.

25. Plaintiff has attempted unsuccessfully to resolve its dispute with the AEOI by amicable discussion.

26. Interest on Plaintiff's unpaid invoices (allowing for deferral of certain invoices until the end of the Contract as provided in Section 8.2.6 of the Contract) at the contractual rate of 6% per annum from one hundred five (105) days after submission of each invoice until January 31, 1981, is $351,377.77.

27. Daily interest on Plaintiff's unpaid invoices at 6% per annum is $565.07 per day.

28. The foregoing findings of fact, to the extent that they are conclusions of law, shall be regarded as conclusions of law.

CONCLUSIONS OF LAW

29. Iran is a foreign state as defined in 28 U.S.C. Section 1603(a).

30. The AEOI is an agency and instrumentality of Iran as defined in 28 U.S.C. Section 1603(b) and, as such, is a foreign state as defined in 28 U.S.C. Section 1603(a).

~~31. Iran is not currently entitled to immunity from suit in United States courts.~~ *LEW*

32. A claim of sovereign immunity can be asserted only *LEW*
by an appropriately credentialed diplomatic representative of the sovereign, not by a private attorney.

33. Iran waived immunity from this suit for itself and for the AEOI in Article XI, Paragraph 4 of the Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States, 8 U.S.T. 899 (1957).

34. Neither the AEOI nor Iran is immune from suit herein by virtue of the provisions of 28 U.S.C. Section 1605(a)(2).

35. Neither the AEOI nor Iran is immune from suit herein by virtue of the provisions of 28 U.S.C. Section 1605(a)(2).

36. The Court has subject matter jurisdiction over this action and personal jurisdiction over the AEOI and Iran under 28 U.S.C. Section 1330.

37. Venue of this action is proper in the Central District of California under 28 U.S.C. Section 1391(f).

38. The AEOI breached the Contract by failing and refusing, and continuing to fail and refuse, to pay the amounts due under the Contract as set forth in the findings above.

39. Plaintiff has performed all covenants, conditions and promises required of it on its part to be performed under the Contract in accordance with the terms and conditions thereof.

40. As a direct and proximate result of the AEOI's breaches of the Contract, Plaintiff has suffered damages, as of January 31, 1981, in the amount of $3,828,930.79, consisting of $3,437,553.02 in unpaid invoices, $351,377.77 in interest thereon at the Contract rate of six percent per

annum, and $40,000 in unreimbursed warranty defense costs.

41. Plaintiff is entitled to judgment against the AEOI and Iran on its first cause of action in the amount of $3,828,930.79 plus $565.07 per day after January 31, 1981.

42. Within four years of the filing of the complaint herein, accounts were stated in writing between Plaintiff and the AEOI, on the basis of which there was found due and owing from the AEOI to Plaintiff the sum of $5,743,-063.95, of which sum the AEOI has paid $3,653,278.17 and of which $2,089,785.78 remains unpaid.

43. Plaintiff is entitled to judgment against the AEOI and Iran on its second cause of action in the amount of $2,089,785.78 plus interest at the legal rate.

44. Within four years last past, the AEOI became indebted to Plaintiff in the sum of $3,437,553.02 for professional services rendered, costs incurred and materials furnished by Plaintiff to the AEOI at the special instance and request of the AEOI and for which the AEOI agreed to pay said sum, which sum was reasonable.

45. Plaintiff is entitled to judgment against the AEOI and Iran on its third cause of action in the amount of $3,437,553.02 plus interest at the legal rate.

46. Within four years last past, the AEOI became indebted to Plaintiff in the sum of $3,437,553.02 for professional services rendered, costs incurred and materials furnished by Plaintiff to the AEOI at the special instance and request of the AEOI, for which the AEOI agreed to pay a reasonable sum.

47. A reasonable sum for said services, costs and materials is $3,437,553.02.

48. Plaintiff is entitled to judgment against the AEOI and Iran on its fourth cause of action in the amount of $3,437,553.02 plus interest at the legal rate.

49. The foregoing conclusions of law, to the extent that they are findings of fact, shall be regarded as findings of fact.

Dated: February 18, 1981

/s/ LAUGHLIN E. WATERS
Laughlin E. Waters
United States District Judge

Presented By:

TUTTLE & TAYLOR Incorporated
MERLIN W. CALL
C. STEPHEN HOWARD
WILLIAM C. SCHWEINFURTH
JEFFREY M. HAMERLING

/s/ C. STEPHEN HOWARD
C. Stephen Howard, a member of the law firm of TUTTLE & TAYLOR Incorporated, *Attorneys for Plaintiff Dames & Moore*

Notice of Entry

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-04918 LEW (Px)

DAMES & MOORE,

Plaintiff(s),

vs.

ATOMIC ENERGY ORGANIZATION OF IRAN, *et al.*,

Defendant(s).

To the Above Named Parties and
To Their Attorney(s) of Record:

You are hereby notified that Judgment Against Defendants Atomic Energy Organization of Iran and State and Government of Iran in the above entitled case was entered in the docket on February 18, 1981.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

Notice of Entry

CERTIFICATE OF MAILING

I, EDWARD M. KRITZMAN, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on February 18, 1981, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

C. Stephen Howard
609 S. Grand Avenue
Los Angeles, CA 90017

Simon Taylor
Rabinowitz, Boudin & Standard
30 E. 42nd St., Rm. 1610
New York, NY

Chris Gasparich
1939 Harrison Street
Oakland, CA 94612

Peter Strong
555 S. Flower St., Ste. 4310
Los Angeles, CA 90071

Michael D. Koomer
1800 Avenue of the Stars
Ste. 500
Los Angeles, CA 90067

AUSA Dzintra Janavs
Civil Division

Daniel P. Levitt
919 Third Avenue
New York, NY 10022

EDWARD M. KRITZMAN,
Clerk

By /s/ MAY Y. DAO
Deputy Clerk

Judgment Against Defendants Atomic Energy Organization of Iran and State and Government of Iran

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-04918 LEW (Px)

DAMES & MOORE, a partnership,

Plaintiff,

v.

ATOMIC ENERGY ORGANIZATION OF IRAN, STATE AND GOVERNMENT OF IRAN, BANK MELLI IRAN, INDUSTRIAL CREDIT BANK, INDUSTRIAL AND MINING DEVELOPMENT BANK OF IRAN, INTERNATIONAL BANK OF IRAN, AGRICULTURAL DEVELOPMENT BANK OF IRAN, BANK MARKAZI IRAN, BANK OF TEHRAN, AGRICULTURAL COOPERATIVE BANK OF IRAN, BANK BAZARGANI IRAN, BANK BIMEH IRAN, BANK IRANSHAHR, BANK DARIUSH, BANK KAR, THE BANK OF IRAN AND THE MIDDLE EAST, BANK OF OMRAN, BANK PARS, BANK RAFAH KARGARAN, BANK SADERAT IRAN, BANK SAKHTEMAN, BANK SANAYE IRAN, BANK SEPAH, BANK SHAHRYAR, BANQUE ETEBARATE IRAN, DEVELOPMENT AND INVESTMENT BANK OF IRAN, DISTRIBUTORS COOPERATIVE CREDIT BANK, THE FOREIGN TRADE BANK OF IRAN,

Defendants.

Date: February 17, 1981

Time 9:00 A.M.

Judgment Against Defendants Atomic Energy Organization of Iran and State and Government of Iran

The Motion of Plaintiff Dames & Moore ("Plaintiff") for Summary Judgment against Defendants Atomic Energy Organization of Iran ("AEOI") and State and Government of Iran having come on for hearing on Tuesday, February 17, 1981, at 9:00 A.M. and the Court having considered the papers filed by the parties and having heard the arguments of counsel; and the Court having made findings of fact and conclusions of law, and good cause appearing;

IT IS HEREBY ORDERED that the Motion of Plaintiff for Summary Judgment against Defendants AEOI and Iran is granted; and

IT IS FURTHER ADJUDGED, ORDERED, and DECREED that:

1. Plaintiff shall have judgment against defendants AEOI and the State and Government of Iran (or any other name by which the State and Government of Iran refers to itself, including, but not limited to the Islamic Republic of

Iran) in the amount of ~~$3,820,~~930.79 (which amount includes interest to January 31, 1981 at the contract rate of six percent in the amount of $351,377.77) plus interest after January 31, 1981 at the contract rate of six percent in the amount of $565.07 per day.

2. There is no just reason for delay in entering final judgment and therefore, the Court expressly directs that final judgment be entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: February 18, 1981

/s/ LAUGHLIN E. WATERS
Laughlin E. Waters
United States District Judge

Judgment Against Defendants Atomic Energy Organization of Iran and State and Government of Iran

Presented By:

TUTTLE & TAYLOR Incorporated
MERLIN W. CALL
C. STEPHEN HOWARD
WILLIAM C. SCHWEINFURTH
JEFFREY M. HAMERLING

.....

C. STEPHEN HOWARD, *a member of the law firm of Tuttle & Taylor Incorporated, Attorneys for Plaintiff*

I hereby attest and certify on February 18, 1981, that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

By /s/ MAY Y. DAO, Deputy

No. 80-2078

JUN 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, the Secretary of the Treasury of the United States of America, and THE UNITED STATES OF AMERICA,

Respondents,

and

BANK MARKAZI IRAN, THE ISLAMIC REPUBLIC OF IRAN and THE ATOMIC ENERGY ORGANIZATION OF IRAN,

Intervenors.

BRIEF OF INTERVENOR BANK MARKAZI IRAN

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June 19, 1981

Questions Presented for Review

1. Whether the President of the United States had the constitutional and statutory authority in an undisputed national emergency to order the transfer of blocked Iranian assets in accordance with the terms of an international agreement settling disputes between Iran and the United States, notwithstanding attachments against such assets which had been obtained subsequent to the blocking order pursuant to a revocable license issued by the Secretary of Treasury?

2. Whether the President had the constitutional and statutory authority to submit the claims of United States nationals against a foreign state and its agencies and instrumentalities to binding international arbitration, in furtherance of the compelling foreign policy and security interests of the United States?

3. Whether petitioner presently, if ever, is entitled to compensation for Executive actions rescinding its revocable license to attach previously blocked Iranian assets, and submitting its underlying claim against Iranian sovereign entities to binding international arbitration?

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

Executive Orders and Regulations Involved 1

Statement of the Case 2

Summary of Argument 6

ARGUMENT—

POINT I—

The President Had the Constitutional and Statutory Authority in an Undisputed National Emergency to Order the Transfer of Blocked Iranian Assets to the Federal Reserve Bank of New York for Disposition in Accordance With the Terms of the Algerian Declarations, Notwithstanding Prior Attachments Against Such Assets Which Had Been Obtained Pursuant to a Revocable Treasury Department License Subsequent to the Order Blocking the Assets 8

POINT II—

The Executive Branch Has the Constitutional Authority in Undisputed National Emergencies to Submit the Claims of United States Nationals Against Foreign States to Binding International Arbitration, to Further the Settlement of Disputes With Such Foreign States 16

A. There Exists a Systematic, Unbroken Executive Practice, Acquiesced in and Approved by Congress, by Which the Executive Branch Has Waived or Settled Claims of United States Nationals Against Foreign States and Their Nationals 16

PAGE

B. The Courts Have Recognized and Upheld the President's Constitutional Powers to Waive and Settle Claims of United States Nationals 22

C. The Executive Actions Do Not Violate Article III of the Constitution 25

D. The FSIA Does Not Alter the Executive's Historic Claims Settlement Powers 29

POINT III—

The Question of the Adequacy of the Compensation, if Any, Due to Petitioner Is Not a Basis for Judicial Interference With Implementation of the Executive's Actions 35

A. The Executive's Revocation of Petitioner's Conditional License to Attach Iranian Assets Which Previously Had Been Blocked by the Executive Does Not Constitute a Taking 35

B. No Determination Presently Can Be Made as to Whether Petitioner Would Suffer a Compensable Loss as a Result of the Claims Settlement Agreement 36

C. Even if Petitioner Does Suffer a Loss and Has a Right to Compensation, the Question of the Existence and Adequacy of Petitioner's Remedy Is a Political Question, Which the Political Branches Have Resolved by Establishing Exclusive Jurisdiction Over Petitioner's Claim in the Court of Claims 37

CONCLUSION 40

Appendix A—

Partial List of Executive Agreements Settling Claims A-1

Appendix B— PAGE

Congressional Responses to Specific Executive Agreements and to the General Practice of the Executive in Settling Claims B-1

Appendix C—

Executive Order and Regulations Involved C-1

TABLE OF AUTHORITIES

Cases:

Alexewicz v. *General Anidine & Film Corp.*, 43 N.Y.S. 2d 713 (Sup. Ct. 1943) 10
American Int'l Group Inc. v. *Islamic Republic of Iran*, No. 80-1779 (D.C. Cir. 1981) 8, 16, 19, 26, 35-36
Aris Gloves Inc. v. *United States*, 420 F.2d 1386 (Ct. Cl. 1970) 39
In Re Atocha, 84 U.S. (17 Wall.) 439 (1873) 21

Baker v. *Carr*, 369 U.S. 186 (1962) 27, 28
Banco Nacional de Cuba v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964) 26
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 28
The Brig Freemason v. *United States*, 45 Ct. Cl. 555 (1910) 22
Brownell v. *Singer*, 374 U.S. 403 (1954) 13

Chas. T. Main International Inc. v. *Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. 1981) 8, 10 16, 20, 26, 36
Comegys v. *Vasse*, 26 U.S. (1 Pet.) 193 (18) 17
Compania Espanola de Navegacion Maritima v. *The Navemar*, 303 U.S. 68 (1938) 29

Filartiga v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) 26

PAGE

First National City Bank v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972) 28-29

Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 38
Gray v. *United States*, 21 Ct. Cl. 340 (1886) ..17, 21-23, 37-38
Great Western Insurance Co. v. *United States*, 112 U.S. 193 (1884) 23

Hughes Aircraft Co. v. *United States*, 534 F.2d 889 (Ct. Cl. 1976) 39

Meade v. *United States*, 2 Ct. Cl. 224 (1866), aff'd, 76 U.S. (9 Wall.) 691 (1869) 21, 22
Mitchell v. *Laird*, 159 U.S. App. D.C. 344, 488 F.2d 611 (1973) 27

Nielsen v. *Secretary of the Treasury*, 137 U.S. App. D.C. 345, 424 F.2d 833 (1970) 13

Orvis v. *Brownell*, 345 U.S. 183 (1953) 6,10, 12-15
Ozanic v. *United States*, 188 F.2d 228 (2d Cir. 1951) 7, 17, 25

The Paquete Habana, 175 U.S. 677 (1900) 26
Ex Parte Peru, 318 U.S. 578 (1943) 29
Posados v. *National City Bank*, 296 U.S. 493 (1936) 35
Propper v. *Clark*, 337 U.S. 472 (1949) 10

Real v. *Simon*, 510 F.2d 556 (5th Cir. 1975) 34-35
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 38
Rich v. *Naviera Va Cuba*, 295 F.2d 24 (4th Cir. 1961) 29

Sardino v. *Federal Reserve Bank*, 361 F.2d 106 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966) 10, 13
Ship Apollo v. *United States*, 35 Ct. Cl. 420 (1900) 21

PAGE

The Ship Tom, 29 Ct. Cl. 68 (1894) 22
Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963) 35
Spacil v. *Crowe*, 489 F.2d 614 (5th Cir. 1974) 29
Stuart v. *Laird*, 5 U.S. (1 Cranch.) 299 (1803) 19

Texas Trading and Milling Corp. v. *Federal Republic of Nigeria*, No. 80-7703 (2d Cir. April 16, 1981) 30

Unidyne Corp. v. *Government of Iran*, No. 80-029-A (E.D. Va., March 30, 1981) 13-14
United States v. *Belmont*, 301 U.S. 324 (1937) 7, 16, 23-25, 32
United States v. *Midwest Oil Company*, 236 U.S. 459 (1915) 19
United States v. *Pink*, 315 U.S. 203 (1942) 7, 16, 17, 19, 21, 23-26
United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) 15, 21, 22, 26
United States v. *Weld*, 127 U.S. 51 (1888) 39

Ware v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796) 26

Youngstown Sheet & Tube Company v. *Sawyer*, 343 U.S. 579 (1952) 18-19

Zittman v. *McGrath (I)*, 341 U.S. 446 (1951) 11
Zittman v. *McGrath (II)*, 341 U.S. 471 (1951) 11-13

Statutes:

22 U.S.C. § 1621 *et seq.*, as amended (1980) 33

28 U.S.C. § 171 38

28 U.S.C. §§ 1330, 1602, *et seq.*, Foreign Sovereign Immunities Act of 1976 ..... *passim*

PAGE

28 U.S.C. § 1332(a)(2) (1976) 30

28 U.S.C. § 1491, Tucker Act 38

28 U.S.C. § 1502 39

50 U.S.C. §§ 1701, *et seq.*, International Emergency Economic Powers Act ..... *passim*

50 U.S.C. App. § 5(b), Trading With the Enemy Act 9-11, 33

40 Stat. 411 (1917) 11

55 Stat. 838 (1941), War Powers Act of 1941 11

International Agreements:

Agreement Between the United States and Peru, 25 U.S.T. 227, T.I.A.S. No. 7792 (1974) 21

Agreement Between the United States and the Hungarian Peoples Republic, 24 U.S.T. 552, T.I.A.S. No. 7569 (1973) 21

Agreement Between the United States and Peoples Republic of Bulgaria, 14 U.S.T. 969, T.I.A.S. No. 5387 (1963) 21

Agreement Between the United States and the Polish Peoples Republic, 11 U.S.T. 1952, T.I.A.S. No. 4545 (1960) 21

Agreement Between the United States and the Romanian Peoples Republic; 11 U.S.T. 317, T.I.A.S. No. 4451 (1960) 21

Declaration of the Government of the Democratic and Popular Republic of Algeria (Algerian Declaration) ..... *passim*

PAGE

Declaration of the Government of the Democratic and Popular Government of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Algerian Declaration) ....*passim*

Executive Order and Regulations:

Executive Order No. 12170, 44 Fed. Reg. 65729 ..... 1, 2

Executive Orders Nos. 12276-12285, 46 Fed. Reg. 7913-32 4

Executive Order No. 12279, 46 Fed. Reg. 7919 4

Executive Order No. 12294, 46 Fed. Reg. 14111 5

31 C.F.R. § 212 33

31 C.F.R. § 500.504 33

Cuban Assets Control Regulations,
31 C.F.R. § 515, *et seq.* 33
§ 515.504 33

Iranian Assets Control Regulations, 31 C.F.R. Part 535 1
§ 535.201 ..... 1, 2
§ 535.203(e) 1, 2
§ 535.418 ..... 1, 2
§ 535.504 ..... 1, 3
§ 535.805 ..... 1, 2

Other Authorities:

5 Hackworth, Digest of International Law (1943) .....

Hearings on the Algerian Declarations Before the House Committee on Foreign Affairs, 97th Cong., 1st Sess. (February 19, 1981) 34

PAGE

Hearings Before the Senate Committee on Banking, Housing and Urban Affairs: Iranian Assets Settlement, 97th Cong., 1st Sess. (February 19, 1981) 34

Hearings on the Algerian Declarations Before the Senate Committee on Foreign Affairs, 97th Cong., 1st Sess. (February 17 and 18, 1981) 34

Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee on HR 11315: Jurisdiction of U.S. Courts in Suits Against Foreign States, 94th Cong., 2d Sess. (1973) 31

Hearings Before the Subcommittee on Claims and Governmental Relations of the House Judiciary Committee on H.R. 3493: Immunities of Foreign States, 93rd Cong., 1st Sess. (1973) 31

Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, Congressional Oversight of Executive Agreements—1975, 9t4h Cong., 1st Sess. (1975) 32

Henkin, Foreign Affairs and the Constitution (1972) ..16-17

H.R. Rep. No. 84-624, 84th Cong., 1st Sess. (1955), reprinted in [1955] U.S. Code Cong. & Ad. News 2745 24

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976) 30

H.R. Rep. No. 95-459, Trading With the Enemy Act Reform Legislation, 95th Cong., 1st Sess. (1977) 10

5 Miller, Treaties and Other International Acts of the United States of America 16

Moore, International Law Digest (1906) 16, 18, 22, 23, 26

Moore, Treaties and Executive Agreements, Pol. Science Q. 385, reprinted at 62 Cong. Rec. 13063-68 (Sept. 21, 1922) 16, 18

PAGE

Restatement (Second), Foreign Relations Law of the United States
§ 3 26
§ 205 26
§ 213 ..... 17, 26

S. Rep. No. 94-1310, 94th Cong., 2d Sess. (1976) 30

S. Rep. No. 95-466, 95th Cong., 2d Sess. (1977) 33

26 Dept. State Bull. 984 (1952) 20

Statute of the International Court of Justice, Art. 38(b) 26
1946-47 U.N. Yearbook 843 26

8 Whiteman, Digest of International Law (1967) 26

14 Whiteman, Digest of International Law (1970) 18

No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, the Secretary of the Treasury of the United States of America, and THE UNITED STATES OF AMERICA,

Respondents,

and

BANK MARKAZI IRAN, THE ISLAMIC REPUBLIC OF IRAN and THE ATOMIC ENERGY ORGANIZATION OF IRAN,

Intervenors.

BRIEF OF INTERVENOR BANK MARKAZI IRAN

Executive Orders and Regulations Involved

In addition to the authorities set forth in the petition at 2-3, this case involves the following executive orders and regulations: Executive Order No. 12170, 44 Fed. Reg. 65729; Iranian Assets Control Regulations, 31 C.F.R. Part 535, §§ 535.201, 535.203(e), 535.418, 535.504, 535.805, which are set forth in Appendix C to this brief.

Statement of the Case

On November 14, 1979, the President of the United States, acting pursuant to the International Economic Emergency Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706, declared a national emergency and ordered blocked "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States. . . ." Executive Order No. 12170, 44 Fed. Reg. 65729. The President further authorized the Secretary of the Treasury to employ all powers granted to the President under the IEEPA to carry out the blocking order. The Treasury Department thereupon promulgated regulations, effective November 14, 1979, prohibiting, absent a license or authorization, any attachment, injunction, judgment or other judicial process against property in which Iran or its entities had an interest. 31 C.F.R. §§ 535.201, 535.203(e) (1980). On November 19, 1979, the Treasury Department issued a regulation stating: "the provisions of this part and any rulings, licenses, authorizations, instructions, orders or forms issued thereunder may be amended, modified or revoked at any time." 31 C.F.R. § 535.805 (1980).

Subsequently, the Treasury Department authorized certain judicial proceedings against Iran, but prohibited the "entry of any judgment or any decree or order of similar or analogous effect. . . ." 31 C.F.R. § 535.504(a),(b)(1) (1980). On December 19, 1979, the Secretary issued a clarifying regulation which stated:

> The general authorization for judicial proceedings contained in § 535.504(a) includes pre-judgment attachment. However, § 535.504(a) does not authorize payment or delivery of any blocked property to any court, marshal, sheriff, or similar entity, and any such

> transfer of blocked property is prohibited without a specific license. It would not be consistent with licensing policy to issue such a license.

31 C.F.R. § 535.418 (1980).

On December 20, 1979, petitioner filed suit in the United States District Court for the Central District of California against the Government of Iran, Bank Markazi Iran, and other Iranian instrumentalities. The district court issued writs of attachment against the property of the defendants, including Bank Markazi. Additional writs of attachment were issued and served on January 4, February 4, and May 12, 1981. In no instance, however, were the attached assets actually turned over to a sheriff or other authority.

On January 19, 1981, the governments of the United States of America and the Islamic Republic of Iran formally adhered to the so-called "Algerian Declarations" [1] as a means of settling certain outstanding disputes between the two governments and their respective nationals. The Declarations require the United States "to terminate all legal proceedings in the United States courts involving claims of United States persons and institutions against Iran and its enterprises, to nullify all attachments and judgments obtained therein, [and] to prohibit all further litigation based on such claims . . ." Declaration I, Principle B. The United States further agreed to "bring about the transfer" or to "arrange for the transfer" of all Iranian assets in the United States or in the custody of persons

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[1] There were two Declarations: the "Declaration of the Government of the Democratic and Popular Republic of Algeria" (Declaration I), and the "Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran" (Declaration II). The Declarations are set forth in the Appendix to the Petition (Pet. App.) at A-21 to A-35.

subject to the jurisdiction of the United States, either immediately or by no later than July 19, 1981.

The Declarations further provide that, with certain exceptions, all claims of United States nationals against Iran or Iranian governmental entities are to be submitted to an international arbitration tribunal which has been established by the two countries. Iran has undertaken to pay in full all awards rendered by the tribunal and to attempt prearbitration settlement of claims. Iran further has agreed: (1) that its assets in the United States will be used to establish a $1 billion escrow fund as security for the satisfaction of the arbitration awards; (2) that it will maintain a minimum balance of $500 million as the initial sums are used to pay awards; (3) that the arbitration awards will be enforceable in the courts of any nation; (4) to the transfer of approximately $1.418 billion of its assets in escrow as security for the payment of principal and interest on nonsyndicated loans to United States banks as well as any other disputed amounts of principal or interest due to United States banks, the amounts to be ascertained by negotiations and, failing that, by arbitration. Iran already has paid in full principal and interest on all syndicated loans involving United States banks.

On January 19, 1981, President Carter issued a series of executive orders implementing the terms of the Algerian Declarations. Executive Order Nos. 12276-12285 (46 Fed. Reg. 7913-7932) (Pet. App. at A-36 to A-51). In pertinent part, these orders revoked all licenses for attachments and other restraints with respect to Iranian assets, nullified all non-Iranian interests in such assets subsequent to the November 14, 1979 blocking order, and required those holding blocked Iranian assets to transfer them to the Federal Reserve Bank of New York "to be held or transferred as directed by the Secretary of the Treasury." See Executive Order No. 12279, 46 Fed. Reg. 7919. On February 24, 1981, President Reagan "ratified" the January 19 orders, and

additionally "suspended" all "claims which may be presented to the [Tribunal]" and provided that such claims "shall have no legal effect in any action now pending in any court of the United States." Executive Order No. 12294, 46 Fed. Reg. 14111 (Pet. App. at A-52).

On February 18, 1981 the district court entered summary judgment in favor of petitioner against two defendants: the Government of Iran and the Atomic Energy Organization of Iran (Pet. App. at A-13). Subsequently, the United States filed a Statement of Interest setting forth the terms of the Algerian Declarations and implementing orders and regulations and requesting that the district court vacate the attachments and judgments and stay the litigation.

In response, on April 28, 1981 petitioner filed a separate action in the United States District Court for the Central District of California against Secretary of the Treasury Donald T. Regan and the United States of America, seeking a declaratory judgment that the Executive's actions in entering into and implementing the Algerian Declarations were unlawful. Petitioner further sought injunctive relief prohibiting the Executive branch from implementing the Declarations with respect to petitioner's pending action against the Iranian defendants in the Central District of California.

The district court consolidated its consideration of the two cases. On May 28, 1981, the district court upheld the action of the Executive branch implementing the Algerian Declarations. The court dismissed petitioner's action against the Secretary of the Treasury and the United States, vacated the prejudgment attachments against the Iranian defendants, stayed the summary judgment against the Government of Iran and the Atomic Energy Organization of Iran, and stayed further proceedings in the underlying action against the Iranian defendants (Pet. App. at A-106, A-161). The district court certified to the court of

appeals the question of the Executive's statutory and constitutional authority to implement the Declarations. Petitioner noticed and docketed its appeal to the United States Court of Appeals for the Ninth Circuit (Pet. App. at A-164), and then filed a petition for a writ of certiorari before judgment. On June 11, 1981, this Court granted certiorari, and granted the motions of Bank Markazi Iran, the Islamic Republic of Iran, and the Atomic Energy Organization of Iran to intervene.

Summary of Argument

The President had the power under the IEEPA to order the transfer of the blocked Iranian assets to the Federal Reserve Bank for disposition in accordance with the terms of the Algerian Declarations. The President previously had exercised federal control over the assets when he issued his original blocking order on November 14, 1979. The Treasury Department's conditional license permitting petitioner to seek attachments against Iranian assets was, by its terms, revocable at any time. Thus, when petitioner obtained its attachment after the President had exercised federal control over the assets, it did so subject to the paramount Federal authority conferred by the IEEPA. This Court's decision in *Orvis* v. *Brownell*, 345 U.S. 183 (1953), is dispositive in upholding the Executive's actions.

The President also had constitutional authority under his foreign affairs power to settle the claims of United States nationals against Iran by submitting the claims to binding international arbitration. The Executive practice of settling claims of United States nationals against foreign states has been exercised throughout the nation's history, both in the era of absolute sovereign immunity of foreign states as well as the era of restrictive immunity. It has been exercised with respect to claims against foreign states as well as claims against nationals of foreign states,

and with respect to claims arising out of contractual or other commercial activity, as well as claims arising out of nationalizations or expropriations. And it has been exercised in situations in which the United States nationals opposed the intervention of the Executive, as well as situations in which United States nationals requested such intervention.

Congress repeatedly and consistently has acquiesced in, approved of and facilitated the Executive's exercise of the claims settlement powers, in all of the situations outlined above. And this Court, as well as the lower federal courts, likewise has recognized and approved the Executive's exercise of the claims settlement power. *United States* v. *Belmont,* 301 U.S. 324 (1937), *United States* v. *Pink,* 305 U.S. 203 (1942), *Ozanic* v. *United States,* 188 F.2d 288 (2d Cir. 1951).

Enactment of the Foreign Sovereign Immunities Act of 1976 (FSIA) 28 U.S.C. § 1602, *et seq.*, did not restrict the Executive's claims settlement power. The FSIA codified the restrictive theory of sovereign immunity, which had been followed by the Executive since at least 1952. It provided that determinations of immunity pursuant to that theory henceforth would be made by the courts, not by the State Department. Neither the Executive branch, which requested enactment of the FSIA, nor the Congress assumed that the FSIA would restrict the Executive's foreign affairs powers, including the claims settlement power. Indeed, the very Congress which enacted the FSIA also considered and, at the urging of the Executive branch, rejected legislation intended to restrict the President's power to enter into Executive agreements, including claims settlement agreements. Moreover, subsequent to the enactment of the FSIA, Congress continued to acknowledge, acquiesce in and facilitate the Executive's claims settlement authority.

Finally, petitioner has suffered no compensable loss by the Executive's actions in vacating the attachments and

transferring the assets, because petitioner's attachments from their inception were subject to paramount federal control under the IEEPA. It is premature and wholly speculative as to whether petitioner will suffer a compensable loss by the referral of its claim to international arbitration. Moreover, if ultimately petitioner should suffer a compensable loss, it has an adequate remedy at law against the United States in the Court of Claims.

ARGUMENT

POINT I

The President Had the Constitutional and Statutory Authority in an Undisputed National Emergency to Order the Transfer of Blocked Iranian Assets to the Federal Reserve Bank of New York for Disposition in Accordance With the Terms of the Algerian Declarations, Notwithstanding Prior Attachments Against Such Assets Which Had Been Obtained Pursuant to a Revocable Treasury Department License Subsequent to the Order Blocking the Assets.

As the courts of appeals for the First and District of Columbia circuits have emphasized in recent decisions upholding the Executive actions at issue in this case,[2] the language of the IEEPA, by its terms, authorized the Executive's actions in ordering the transfer of the Iranian assets and the nullification of the attachments. The IEEPA grants the President broad powers to "deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of

[2] *Chas. T. Main International Inc.* v. *Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. 1981); *American Int'l Group Inc.* v. *Islamic Republic of Iran*, No. 80-1779 (D.C.Cir. 1981).

the United States with respect to such threat." 50 U.S.C. § 1701(a). Among those powers, the President may "direct and compel, nullify, void . . . any acquisition . . . transfer, withdrawal, transportation . . . or exercising any right, power or privilege with respect to . . . any property in which any foreign country or national thereof has any interest." 50 U.S.C. 1702(a) 1(B).

The executive orders "direct[ing] and compel[ling]" the transfer of Iranian assets to the Federal Reserve Bank of New York for disposition in accordance with the terms of the Algerian Declarations fall squarely within the mandate of § 1702. Similarly, the executive orders nullifying any right, power, or privilege in Iranian property in the United States derived from any outstanding attachment or injunction, and prohibiting the exercise of any such right, power or privilege, track the precise language of the statute.

Petitioner concedes that the language of the statute "is sweeping in breadth" (Pet. at 21), and offers no construction contrary to that adopted by the Secretary of the Treasury and the First and District of Columbia Circuits. Instead, relying on the intent of Congress to restrict Executive power in ways not relevant to the present case, petitioner argues that the words of the IEEPA do not mean what they say, but instead were meant to deprive the Executive of the very powers explicitly set forth in the statute.

The historical background and the legislative history of the IEEPA belie petitioner's argument. The IEEPA was enacted in 1977 as a peacetime alternative to the Trading With the Enemy Act (TWEA), 50 U.S.C. App. § 5(b), which was reenacted at the same time solely as a wartime measure. With several limited exceptions, which are not relevant here,[3] IEEPA granted the President

[3] The IEEPA's principal restrictions on the President's power are not substantive but procedural. The President cannot use the powers contained in the IEEPA unless he declares that a national

broad powers which "basically parallel" the TWEA,[4] to be exercised in times of national emergency short of war.

In particular, the language of section 1702(a)(1) of the IEEPA, the provision upon which the Executive relies in the present case, was adopted *verbatim* from section 5(b) of the TWEA. The powers conferred by that language have long "be[en] given [a] generous scope," *Propper* v. *Clark,* 337 U.S. 472, 581 (1949), and have been held to authorize a wide variety of actions, including nullifying contracts entered into prior to a freezing order, *Alexewicz* v. *General Anidine & Film Corp.,* 43 N.Y.S.2d 713 (Sup. Ct. 1943), as well as the freezing and blocking of assets, *Sardino* v. *Federal Reserve Bank,* 361 F.2d 106 (2d Cir.), *cert. denied,* 385 U.S. 898 (1966); *Propper* v. *Clark.* Indeed, as the First and District of Columbia Circuits held, the actions of the President in the present context are "virtually identical" [5] to actions the President took pursuant to the same statutory language with respect to Japanese and German assets prior to and after World War II, actions which this Court upheld in *Orvis* v. *Brownell,* 345 U.S. 183 (1953).

Just prior to World War II, the Executive exercised its powers under § 5(b) of TWEA by blocking the assets of German and Japanese nationals, but granting limited

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emergency exists, and makes a formal report to Congress setting forth the reasons for his declaration and the actions he has taken. 50 U.S.C. § 1703(a)-(c). Congress can then reject the President's declaration of an emergency by joint resolution of both houses. 50 U.S.C. § 1706(b).

The two major substantive powers which were contained in the TWEA, but eliminated from the IEEPA, were the power to vest, *i.e.,* to take title to foreign property, and the power to regulate purely domestic transactions. H.R. Rep. No. 95-459, *Trading With the Enemy Act Reform Legislation,* 95th Cong. 1st Sess. at 15 (1977). The other § 5(b) powers not included in the IEEPA were the power to regulate gold and bullion and to seize records.

[4] H.R. Report No. 95-459 at 14-15.

[5] *Chas. T. Main International,* typescript op. at 10.

consent to the attachment of such assets. The blocking orders remained in effect throughout the war. At the conclusion of the war, under new statutory authority contained in the War Powers Act of 1941, 55 Stat. 838,[6] the Executive issued further orders vesting the assets in the United States and directing and compelling their transfer to the Alien Property Custodian.

In *Zittman* v. *McGrath* (I), 341 U.S. 446 (1951), the Court held that the vesting order itself did not extinguish the attachments on the attached property, since the United States had taken title to the assets subject to existing liens or encumbrances. In *Zittman* v. *McGrath* (II), 341 U.S. 471 (1951), however, the Court held that the Alien Property Custodian nevertheless could "direct and compel" a garnishee bank to transfer to the Custodian assets which had been attached pursuant to the earlier general assent, stating:

> In view of these facts, we decide, and decide only, that the Custodian has power to possess himself of the funds and to administer them. To hold otherwise would be incompatible with the federal program.

341 U.S. at 474.

The question of the Custodian's right and power to deal with the transferred assets in the light of the attachments

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[6] Until 1941, section 5(b) of the TWEA did not contain the "direct and compel" language, but only provided the President with power to "investigate, regulate or prohibit any transfers in foreign exchange . . . ", the language now contained in subsection A of section 1702(a)(1) of the IEEPA. 40 Stat. 411 (1917), 50 U.S.C.A. App. section 5 (B). The War Powers Act of 1941 amended section 5(b) essentially by adding two provisions. The first was the language now contained in subsection B of section 1702(a) of IEEPA, authorizing the President to "direct, compel, nullify [and] void", etc., any interests in property of a United States national in which a foreign nation or national has an interest. The second permitted the Executive branch to vest title of such foreign assets in the United States, a power which has been deleted from the IEEPA.

was resolved in *Orvis* v. *Brownell,* 345 U.S. 183. There, the Court held that a creditor who had obtained an attachment after the original blocking order, pursuant to the Executive's general limited assent to attachments, did not acquire an interest in the property to support a claim against the Custodian. The plaintiff creditor had attached a debt owing to a Japanese national and sought to assert its claim against the Custodian, who had acquired possession of the attached assets by the same type of turnover order involved in *Zittman II.* The Court held that:

> While [the freezing order] recognized attachment liens insofar as they determined relationships between creditor and enemy debtor, it did not permit the transfer of a property interest in the blocked funds which could be asserted against the Custodian.

The Court emphasized that the original assent permitting attachment of blocked property was limited and conditional and that the President had the authority to revoke or disregard the assent and to utilize the property in furtherance of a general claims settlement:

> [T]he general assent by the Government to state attachment procedures which we recited in the *Zittman* opinion did not extend so far as to recognize them as effecting a transfer. To so interpret it would ignore the express conditions on which the consent was extended. Realistically, these reservations deprive the assent of much substance; but that should have been apparent on its face to those who chose to litigate. The opportunity to settle their accounts with the enemy debtor was all that the permission to attach granted.

Orvis v. *Brownell,* 345 U.S. at 187.

The Executive's power to "direct, compel, nullify, void, or transfer" assets enabled the Custodian to dispose of the assets regardless of judicial attachments, a power independent of and separate from his power to "vest" the assets.

Orvis, 345 U.S. at 188. See also, *Brownell* v. *Singer,* 347 U.S. 403 (1954), upholding the similar action of the Custodian in the face of a state court judgment and an attempt to execute the judgment on previously attached assets.

The *Zittman-Orvis-Brownell* line of cases is directly relevant here. The Executive has "directed and compelled" the turnover of Iranian assets to the Federal Reserve Bank. His turnover demand rests on the identical statutory language which was held to authorize the turnover demands in *Orvis.* See 345 U.S. at 188, and n.6.

The Iranian regulatory scheme was designed to serve the same purpose as the World War II freezing controls. The assets were blocked to permit the Executive to gain control over the assets, as against Iran, on the one hand, and against American claimants, on the other, so that the Executive could utilize the assets to protect the economic and foreign policy interests of the nation. *See Sardino* v. *Federal Reserve Bank of New York,* 361 F.2d 106 (2d Cir. 1966); *Nielson* v. *Secretary of the Treasury,* 424 F.2d 833 (2d Cir. 1970). Attachments were conditionally permitted, if otherwise valid, but the existence of an attachment did not permit the creditor to block the transfer of funds by the Executive to further the overriding interests of the United States. To have allowed the assets to be transferred to the sheriff would have interfered with the Executive's ability to utilize the assets in the interests of United States foreign policy in the future. As Judge Bryan held in vacating attachments pursuant to the Algerian Declarations in *Unidyne Corp.* v. *Government of Iran,* No. 80-029-A (E.D. Va. March 30, 1981), slip op. at 7:

> It would be meaningless to recognize the power of the President to negotiate with frozen Iranian assets if he did not also have the power to transfer them at the conclusion of the negotiations. The release of the attachments is a necessary concomitant of the President's foreign relations power under the Constitution

and is further authorized by Congress under the IEEPA.

Petitioner in effect attempts to relitigate the *Orvis* case, which it improperly fails to cite. Like the claimant in *Orvis,* petitioner fastens on the fact that if the President vested assets under the TWEA, he was required to use those assets to pay valid claims of United States creditors against the former owners of the assets. From this, again like the claimant in *Orvis,* petitioner asserts that under the TWEA, and hence under the IEEPA, the President could not direct or compel the transfer of the blocked assets in the face of attachments or other liens obtained by such creditors after the blocking order. *Orvis* held that regardless of whether or not the President had vested the assets, the statute enabled the President to direct or compel the transfer of the assets in furtherance of the paramount federal interests in the assets obtained by the initial blocking order.

The IEEPA's elimination of the Executive's vesting power in non-war time situations does not affect this Court's holding in *Orvis.* The right of Americans to pursue their claims against the Custodian derived directly from the act of vesting: vesting was a power to be exercised *against* the foreign state and in favor of the American creditors. By eliminating the vesting power, Congress restricted the Executive's power only against foreign states and foreign nationals whose property would be subject to Executive regulation. Thus, under IEEPA the Executive retained the right to direct, compel, nullify, void or transfer, etc., interests in foreign property claimed by persons subject to the jurisdiction of the United States, as well as his power to block or restrict a foreign state's *use of* its property in the United States. Under IEEPA, however, the Executive was stripped of his power to oust a foreign state or its nationals of *their* property interests, for the benefit of American claimants.

Under the current circumstances, the Executive acted precisely within the authority conferred by the IEEPA. After blocking Iran's use of its property in the United States, the Executive nullified and voided the interests in such property claimed by American nationals and directed and compelled the transfer of such property to the Federal Reserve Bank of New York for disposition in accordance with the international agreement. The President did not attempt to vest the property in the United States, and thus was not required to dispose of the vested property by satisfying claims of United States nationals.[7]

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[7] Petitioner argues that the Executive's actions in voiding attachments and injunctions and transferring Iranian assets had the effect of depriving Article III courts of jurisdiction over attachments and other provisional remedies. Petitioner would have the Court believe that somehow either the Constitution or the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602, *et seq.*, establishes a substantive right to such provisional remedies. There is, of course, no constitutional right to a prejudgment attachment. Nor does the FSIA provide a substantive right to an attachment. The source of provisional remedies remains state law. The FSIA, in fact, establishes strict limitations on the power of a federal court to apply state law provisional remedies against a foreign sovereign and its entities, particularly a central bank. See 28 U.S.C. §§ 1610(d), 1611(b).

The effect of the Executive's actions, pursuant to the IEEPA, of nullifying state law provisional remedies and of requiring the transfer of Iranian assets, is to establish a new federal rule of law. Under the supremacy clause, the federal rule of law takes precedence over state law provisional remedies, in the same way as, for example, the restrictions imposed by the FSIA upon ordinary state law provisional remedies take precedence, and the federal courts must apply the federal law. *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch.) 103 (1801); *Orvis* v. *Brownell*, 345 U.S. 183 (1953). In so doing, the federal courts act ***within*** their jurisdiction under Article III. See discussion, *post* at 25-29.

POINT II

The Executive Branch Has the Constitutional Authority in Undisputed National Emergencies to Submit the Claims of United States Nationals Against Foreign States to Binding International Arbitration, to Further the Settlement of Disputes With Such Foreign States.

A. *There Exists a Systematic, Unbroken Executive Practice, Acquiesced in and Approved by Congress, by Which the Executive Branch Has Waived or Settled Claims of United States Nationals Against Foreign States and Their Nationals.*

As both the First Circuit and the District of Columbia Circuit recognized,[8] the unbroken historical understanding and practice of all three branches of the United States government, dating back to at least 1794, supports the power of the Executive branch to enter into international agreements, in furtherance of the foreign power interests of the United States, settling or disposing of claims of United States nationals against foreign states or their nationals. See *United States* v. *Belmont*, 301 U.S. 324, 329-30; *United States* v. *Pink*, 315 U.S. 203, and 240 (Frankfurter, J., concurring); Henkin, *Foreign Affairs and the Constitution* 262 (1972); 5 Miller, *Treaties and Other International Acts of the United States of America* 1079 (1934); 6 Moore's *International Law Digest* § 1056 at 1022-25 (1906); J.B. Moore, *Treaties and Executive Agreements*, Sept. 1905 Pol. Science Q. 385, reprinted at 62 Cong. Rec. 13063-68 (Sept. 21, 1922).

While one purpose of the claims settlement power undoubtedly is to protect, to the extent possible, the private interests of American claimants, the principal justification for the power is to enable the Executive to settle international disputes with foreign states through peaceful means and to achieve a state of international amity.

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[8] *Chas. T. Main International, Inc.*, typescript op. at 16-20; *American International Group*, slip op. at 27-32.

> The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromise has existed from the earliest times and has been exercised by the foreign offices of all civilized nations.

Ozanic v. *United States*, 188 F.2d 288, 231 (2d Cir. 1951) (L. Hand, J.); see also *United States* v. *Pink*, 315 U.S. 203, 240 (Frankfurter, J., concurring); *Gray* v. *United States*, 21 Ct. Cl. 340, 344-45, 392 (1886). Accordingly, the President has "sometimes disposed of the claims of citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." L. Henkin, *supra* at 263. See *Gray* v. *United States*, 21 Ct. Cl. 340, 392 (1886); *Comegys* v. *Vasse*, 26 U.S. (1 Pet.) 193 (1828). Indeed the Restatement (Second) of the Foreign Relations Law of the United States states as black letter law that:

> The President may waive or settle a claim against a foreign state based on the responsibility of the foreign state for an injury to a United States national, without the consent of such national.

ALI, Restatement (Second) of the Foreign Relations Law of the United States, § 213 (1965).

In order to convey fully the extraordinary breadth, consistency and clarity of the historic understanding and practice of claims settlement, we have attached two appendices to this brief. Appendix A is a partial list of Executive agreements and treaties settling claims of United States nationals against foreign states and foreign nationals.[9] Appendix B provides an account of congressional responses

[9] We have specified the dates of the agreements, the parties, a description of the claims settled or waived, whether the settlement provided for a mixed commission or arbitration panel to determine the claims, and whether the agreement contained explicit provisions that decisions of the commission or panel would be binding.

to specific Executive agreements and to the general practice of the Executive in settling claims.

As i apparent from Appendix A, the Executive has proceeded to enter into claims settlement agreements both with and without Senate ratification. Senate ratification was a more common practice in the nineteenth century than in the twentieth. As Secretary of State Cass stated in 1859, "the Executive sought the formality of Senate ratification when it was deemed expedient" and did not in any manner feel compelled to do so by the Constitution. 5 Moore, *International Law Digest* 221-22 (1906). In the twentieth century, "it has not been the practice of the Department of State to obtain the approval of the Senate for the settlement of international claims, and a request for congressional action is not made unless appropriations appear to be necessary." 14 M. Whiteman, *Digest of International Law*, 247 (1970). See also J.B. Moore, *Treaties and Executive Agreements, supra*, 62 Cong. Rec. at 13066.

Appendix B demonstrates that from the earliest days of the Republic right up to the Algerian Declarations themselves, Congress has been informed about the Executive's claims settlement actions, and has acquiesced in and even facilitated the Executive's actions.

This consistent, historic pattern and practice of executive action under a claim of constitutional right and congressional acquiescence and approval of that practice has the greatest import for the constitutional arguments made by petitioner. Particularly with regard to questions of the division of powers between the branches of government, an historic practice and understanding as consistent and dramatic as this is dispositive. As Justice Frankfurter wrote in an oft-cited passage in his concurrence in *Youngstown Sheet & Tube Company* v. *Sawyer*, 343 U.S. 579, 610-11 (1952):

> In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and

> never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by §1 of Art. II.

See also the concurring opinion of Jackson, J., 343 U.S. at 636-37; *United States* v. *Midwest Oil Company*, 236 U.S. 459, 472-73 (1915); *Stuart* v. *Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

Petitioner attempts to avoid the force of the historic claims settlement practice and of the doctrine reaffirmed by Justice Frankfurter in *Youngstown* by asserting that most of the Executive claims settlements occurred during the era of the "absolute" theory of sovereign immunity, when, petitioner suggests, United States claimants presumably had no right, and thus no property interests, in their foreign claims. In addition, petitioner argues that prior settlement agreements arose from non-commercial claims such as nationalizations, under which foreign states still retain immunity even under the restrictive theory of sovereign immunity.

Petitioner's argument cannot withstand historical analysis, as the District of Columbia Circuit emphasized in the *American International Group* case (slip op. at 30).

First, petitioner ignores the primary justification for the claims settlement power, *i.e.*, the responsibility of the Executive for the "rehabilitation of relations between the country and another nation". *United States* v. *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring). The fact that in the era of the restrictive theory of sovereign immunity United States claimants may have a greater ability to pursue their claims against foreign states, independently of the United States government, in no way derogates from the necessity for the Executive's claims settlement power. Indeed, in the modern era there is a greater danger that

the claims of United States nationals could become a major impediment to the normalization of international relations and to world peace. Thus, it is even more essential that the Executive retain the power to settle those claims through diplomatic means as a step towards furthering the interest of the entire nation in peaceable international relations. As the First Circuit emphasized in *Chas. T. Main:*

> This case well illustrates the imperative need to preserve a presidential flexibility sufficient to diffuse an international crisis, in order to prevent the crisis from escalating or even leading to war. As the Supreme Court has consistently recognized, it is the President who is charged with rsponsibility as the United States' representative and negotiator in the international arena. [Citations omitted]. The authority to remove impediments to the peaceful resolution of international disputes is an authority necessary to meet the responsibilities of presidential office, and, in the words of the Supreme Court, a "modest implied" attribute of presidential power.

Chas. T. Main International, typescript op. at 19-20.

Second, contrary to petitioner's intimations, the Executive claims settlement practice has been pursued vigorously and with the knowledge, acquiescence and facilitation of Congress, since the State Department adopted the restrictive theory of sovereign immunity in 1952.[10] See Appendix A. During the period since 1952, moreover, the Executive has settled not only nationalization and expropriation claims, but commercial contract claims as well. See, Agreement between the United States and the Polish Peoples Republic, 11 U.S.T. 1952, T.I.A.S. No. 4545 (1960); Agreement between the United States and the Romanian Peoples Republic, 11 U.S.T. 317, T.I.A.S. No. 4451 (1960);

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[10] The restrictive theory was formally adopted in the so-called "Tate Letter", 26 Dept. of State Bull. 984 (1952).

Agreement between the United States and the Peoples Republic of Bulgaria, 14 U.S.T. 969, T.I.A.S. No. 5387 (1963); Agreement between the United States and the Hungarian Peoples Republic, 24 U.S.T. 552, T.I.A.S. No. 7569 (1973); Agreement between the United States and Peru, 25 U.S.T. 227, T.I.A.S. No. 7792 (1974).

Third, even before the advent of the restrictive theory of sovereign immunity, the Executive settled claims of United States nationals which were enforceable as a practical matter. Throughout the nation's history the Executive, in furtherance of its foreign policy power, settled claims of United States nationals against, *inter alia*, citizens and nationals of foreign states who were not entitled to immunity, as well as foreign states which had waived their immunity or otherwise had recognized the right of United States nationals to compensation. *See*, for example, *United States* v. *Schooner Peggy*, 1 Cranch 103, 110 (1801); *Gray* v. *United States*, 21 Ct. Cl. 340 (1886); *Meade* v. *United States*, 2 Ct. Cl. 224 (1886), *aff'd*, 9 Wall 691 (1869); *In Re Atocha*, 17 Wall 439 (1873); *Ship Apollo* v. *United States*, 35 Ct. Cl. 420 (1900); *United States* v. *Pink*, 315 U.S. 203 (1942). See also Appendix A to this Brief. Thus, in *Schooner Peggy*, the United States waived the claims of United States citizens to a foreign ship which a United States circuit court of appeals had held was properly condemned as a prize. In *Gray*, a United States merchant had a valid cause of action against a French privateer in the French courts, and, indeed, the French courts held substantial security to satisfy his claim. The claim nevertheless was waived by the United States in its entirety.

Further, even claims not assertable in courts of law were still considered things of value to the claimant in that sovereigns—including, of course, the United States, which also asserted absolute immunity in this period—frequently felt bound for reasons of principle and credit standing to

acknowledge and settle the claims against them as a matter of grace. *See*, for example, *Meade* v. *United States;* 5 Hackworth, *Digest of International Law*, 501-03, 506-07, 509, 520-21, 524, 611 (1943); 6 Moore, *International Law Digest*, 676-78 (1906); *The Ship Tom*, 29 Ct. Cl. 68, 88-89 (1894); *The Brig Freemason* v. *United States*, 45 Ct. Cl. 555, 562, 566 (1910). Thus, as a practical matter, claims settlement agreements compromised or waived claims which were valuable even prior to the adoption of the restrictive theory.

In short, the Executive's power to settle claims, whether by executive agreement or treaty, was never limited either theoretically or in practice by the nature of the foreign claim or the practical or legal ability of the United States claimants to obtain satisfaction in the absence of the claims agreement. Thus, the advent of the "restrictive" theory of sovereign immunity, to the extent that it narrowed the legal basis upon which a foreign state could resist judicial enforcement of a claim by a United States national, had no effect whatsoever on the entirely separate question of the powers of the Executive to settle such claims under the foreign affairs powers.

B. *The Courts Have Recognized and Upheld the President's Constitutional Powers to Waive and Settle Claims of United States Nationals.*

The federal judiciary, including this Court, has expressly recognized, approved and given effect to Executive actions settling foreign claims of United States nationals, both by treaty and executive agreement. Thus, for example, in *The Schooner Peggy*, the Court upheld a claims settlement agreement with France providing that property captured as a prize by United States nationals, but not yet "definitively condemned" by the courts, must be restored to its French ownership. The Court set aside the lower court's judgment upholding the condemnation order, and ordered that the French ship be returned. Similarly, in the *Gray* case, the Court of Claims stated:

> [I]n the negotiation of 1800 we used "individual" claims against "national" claims, and the set-off was of French national claims against American individual claims. That any Government has the right to do this, . . . or to take other action, which, at the expense of the individual, is most beneficial to the whole people, is too clear for discussion.

21 Ct. Cl. at 392. *See also, Great Western Insurance Co. v. United States,* 112 U.S. 193 (1884).

This Court initially considered the first executive agreement of the modern era waiving and settling claims—the 1933 Agreement with the Soviet Union—in *United States v. Belmont,* 301 U.S. 324 (1937). The unanimous Court took specific note of the long historic practice of the Executive settling claims precisely in the manner done here, referring to the compilation of those executive agreements in Moore, *International Law Digest, supra,* and held that such international compacts did not require the participation of the Senate. 301 U.S. at 330-31.

The Court returned to the 1933 Agreement in *United States v. Pink,* 315 U.S. 203. It reaffirmed its holding in *Belmont* that the Executive could act alone to settle claims of United States citizens. It rejected the further challenge that the Executive could not reach an agreement cutting off interests in Soviet property held in the United States, including interests secured by attachments and judgments, and requiring the individuals holding such claims to obtain relief from a general fund to be administered and distributed according to a program established by the political branches.

Justice Frankfurter, concurring in *Pink,* explicity stated "that the President's control of foreign relations includes the settlement of claims is undisputable." 315 U.S. at 204. Justice Stone, writing for himself and two other Justices, dissented, but in no manner disagreed with the proposi-

tion that the Executive had the constitutional authority to settle claims and cut off property interests when necessary to do so. Rather, his dissent was based exclusively upon his view that the Litvinov agreement did not purport to cut off such property interests and did not require such an effect to accomplish its purposes.

Petitioner seeks to distinguish *Pink* on the ground that the interests in property cut off by the action of the President in that particular case belonged to foreign nationals and corporations. The distinction is meaningless. While, as the *Pink* Court stated, in settling claims the President may favor United States nationals over foreign nationals, the President's power to settle claims and to cut off interests in property within the United States is the same in either instance. The Court in *Pink* acknowledged that under New York law the foreign nationals had a property interest in the assets in question, that the foreign nationals were entitled to the full protection of the Fifth Amendment, and that the foreign nationals had a constitutional right to access to the courts. Nevertheless, the Court held that the executive agreement cutting off the rights of the foreign nationals to the assets in question was valid and had to be given full effect. Indeed, the Litvinov assignments cut off interests in the assets in question of United States nationals as well as foreign nationals, including interests secured by prejudgment attachment and judgments. See H. R. Rep. No. 84-624, 84th Cong., 1st Sess. (1955), reprinted in [1955] U.S. Code Cong. & Ad. News 2745, 2750. *See also* discussion in Appendix B, pp. B-14-15.

Belmont and *Pink* do not rest principally upon the constitutional power of the President to recognize foreign governments. In *Belmont,* the Court made specific reference to the historic practice of the Executive in settling claims with already recognized governments. In *Pink,* the Court spoke of the foreign policy power generally and of the underlying diplomatic and constitutional imperatives for

the Executive's authority to settle claims. In *Pink*, the President's action went beyond mere "recognition" of the Soviet Union; as the Court emphasized again and again, it constituted an effort of the President to normalize relations between two nations.

The point was recognized by the court in *Ozanic* v. *United States*, 188 F.2d 228, 231 (2d Cir. 1951), which held, in an opinion by Judge Learned Hand, that:

> The Constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies.

In the present circumstances, the Executive's actions were undertaken in furtherance of the normalization of relations with a foreign state, actions which are committed to the President under his foreign affairs powers. There is no doctrinal or rational distinction between the action of the Executive in *Pink* and the action of the Executive in the present situation.

C. *The Executive Actions Do Not Violate Article III of the Constitution.*

Petitioner argues that the Executive's implementation of the Algerian Declarations improperly divests the federal courts of jurisdiction over valid cases and controversies in violation of Article III of the Constitution.

Petitioner mischaracterizes the meaning and effect of the Executive's actions. The Executive has not attempted to interfere with the "jurisdiction" of the federal courts over cases and controversies. Rather, acting within his Article II powers, he has "settled" such cases, principally by requiring United States nationals to submit their claims against Iranian entities to an international claims tribunal,

whose decision shall be final and binding. We already have noted that the United States claimants are "bound" by the settlement. Accordingly, there no longer remain live cases or controversies, within the meaning of Article III, over which the courts may exercise jurisdiction. *Chas. T. Main Intl.,* typescript op. at 14-16; *American International Group,* slip op. at 22-25. *See The Schooner Peggy; United States* v. *Pink.*

No Article III question is presented for another reason. Under international law, an agreement between one government and another waiving or settling the claims of nationals relieves the foreign state of any "further responsibility." *Restatement (Second) of the Foreign Relations Law of the United States,* §§205, 213.[11] The well-established practice of nations is to treat such agreements as lawful and binding. In addition to Appendix A, *see,* for example, 8 Whiteman, *Digest of Int'l Law,* § 37 at 1217-33; 6 Moore, *International Law Digest* 1004, 1012-1027; 7 Moore at 52, 58. Such a customary practice of nations, wide-spread and acquiesced in by the world community, constitutes international law. *The Paquete Habana,* 175 U.S. 677, 686 (1900); *Banco Nacional de Cuba* v. *Sabbatino,* 307 F.2d 845 (2d Cir. 1962), *rev'd on other grounds,* 376 U.S. 398 (1964); Statute of the International Court of Justice, Article 38(b); 1946-47 U.N. Yearbook 843.

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination." *The Paquete Habana,* 175 U.S. 677, 700 (1900). *See also,* for example, *Ware* v. *Hylton,* 3 U.S. (3 Dall.) 199 (1796); *Filartiga* v. *Pena-Irala,* 630 F.2d 876, 886-87 (2d Cir. 1980); *Restatement (Second),* § 3. Accordingly, the *substantive*

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[11] *See also,* for example, Statement of Secretary of State Freylinghuysen (1884), in 6 Moore, *International Law Digest,* at 1015-16 (1906).

law applicable here relieves the Iranian defendants of any "further responsibility" than that provided for in the Algerian Declarations. An Article III challenge no more lies here than where there has been an accord and satisfaction under the applicable substantive law.

Conceptualized slightly differently, the President's exercise of his power to enter into claims settlement agreements in furtherance of foreign policy interests of the United States is such a fundamental and necessary aspect of the executive power as to be a political question over which the courts should not and may not exercise judicial review. *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). The various rationales for application of the political question doctrine, expressed in the disjunctive by the Court in *Baker* v. *Carr*, merge here. First, the negotiating of claims settlement agreements as part of the United States foreign policy is committed to the Executive. It is necessary that the President have the power to settle claims if he is to be able to pursue overriding foreign policy goals for the nation as a whole. Similarly, no judicially manageable standard exists with which to adjudicate plaintiffs' claim. It is impossible for the judiciary to put itself in the place of the Executive to determine whether or not an overall agreement settling claims and otherwise normalizing relations with a foreign sovereign is necessary, appropriate or in the best interest of the nation and its citizens. Nor can a court procure the relevant evidence, much of which may be in the possession of foreign governments, some of which may be privileged. *See, Mitchell* v. *Laird*, 159 U.S. App. D.C. 344, 488 F.2d 611, 616 (1973).

In short, any effort by the courts to review an Executive claims settlement agreement necessarily would interject the court into a "policy determination of a kind clearly for non-judicial discretion," would express a "lack of respect" due the Executive branch, and would carry the potential for embarrassment and compromise of the Executive's role in foreign affairs. *Baker* v. *Carr*, 369 U.S. at 217.

The political question doctrine is not jurisdictional. Rather, it requires the judiciary to abstain from exercising its Article III jurisdiction over cases or controversies the resolution of which are committed to the political branches. *See Baker* v. *Carr*. In the present context, otherwise justiciable cases become non-justiciable once the Executive settled or compromised the claims in furtherance of the foreign policy interest of the United States. Such action does not deprive the federal courts of Article III jurisdiction.

Close analogies, and definitive answers to petitioner's Article III argument, are provided by the Act of State cases and the sovereign immunity cases decided prior to the enactment of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602, *et seq.*

In *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), the Court held that the judiciary may not examine the acts of a foreign sovereign done on its own territory even though alleged to be a violation of international law, because to do so would interfere with the Executive's conduct of foreign relations, particularly its efforts in the case of Cuba to negotiate a settlement at some future date of the claims of United States citizens against Cuba. In the Court's view, there was no violation of Article III because the "constitutional underpinnings" of the Act of State doctrine placed primary reliance on the Executive's power and ability to settle claims diplomatically and recognized that judicial action could only interfere with the efforts of the Executive pursuant to its constitutional authority and responsibilities.

The point was dramatically re-emphasized by Justice Rehnquist in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972):

> The act of state doctrine, as reflected in the cases culminating in *Sabbatino*, is a judicially accepted limitation on the normal adjudicative processes of the courts, springing from the thoroughly sound principle

> *that on occasion individual litigants may have to forego decision on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy.*

406 U.S. at 769 (emphasis added).

The sovereign immunity cases are to the same effect. From the early days of the Republic, the United States judiciary bowed to the suggestion of the Executive branch that certain suits against foreign sovereigns, *otherwise within the jurisdiction of the federal courts,* should not be entertained in United States courts. The courts held that determinations of questions of sovereign immunity were committed to the Executive branch as a political question, and that when the Executive suggests to a court that a foreign state be accorded immunity, "courts may not so exercise their jurisdiction." *Ex Parte Peru,* 318 U.S. 578, 588 (1943). *Accord, Compania Espanola de Navegacion Maritima* v. *The Navemar,* 303 U.S. 68, 74 (1938); *Spacil* v. *Crowe,* 489 F.2d 614 (5th Cir. 1974); *Rich* v. *Naviera Va Cuba,* 295 F.2d 24 (4th Cir. 1961).[12]

D. *The FSIA Does Not Alter the Executive's Historic Claims Settlement Powers.*

The FSIA does not have the slightest effect upon the independent Executive power to enter into claims settlement agreements binding upon the parties and, where provided, foreclosing parties from pursuing cases otherwise within the courts' jurisdiction. On its face, the FSIA deals only with the legal determination of whether, in a particular case, a foreign state is entitled to sovereign immunity. Nothing in either the FSIA itself or its legislative

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[12] The subsequent enactment of the Foreign Sovereign Immunities Act, of course, removed the power to make determinations of sovereign immunity from the Executive, and reposed it in the courts pursuant to clearly defined statutory criteria. The fact that the courts are now empowered to make these particular determinations, however, in no way alters the constitutional and jurisprudential significance of the prior practice.

history evidences the slightest suggestion that Congress intended to foreclose the President from settling claims independently of foreign sovereign immunity questions.

Congress was quite clear throughout the legislative process that it was addressing the single issue of sovereign immunity determinations in litigation against foreign states over which the United States courts had jurisdiction even prior to enactment of the FSIA.[13] Congress' repeated references to State Department involvement in such litigation were directed exclusively to the problems that both the Executive branch and Congress saw in connection with State Department participation in determinations of sovereign immunity questions. Both the Senate and House reports state: "since, however, this section deals *solely* with issues of immunity, it in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable." Senate Report No. 94-1310, 94th Cong., 2d Sess. 19 (1976) (emphasis added).

The Executive branch was instrumental in drafting the FSIA, and the Act "was introduced in accordance with the recommendations of an Executive communication." House Rep. No. 94-1487, 94th Cong., 2d Sess. at 6-7 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 6604-6605. If the Executive had intended to restrict its flexibility in international crises, including its constitutional power to settle claims, it would have so stated. Instead, to the contrary, the Legal Advisor to the State Department emphasized in testimony before the House Judiciary Committee that the FSIA would not impinge upon the President's historic powers to settle claims:

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[13] "Before the FSIA, plaintiffs enjoyed a broad right to bring suits against foreign states, subject only to State Department intervention and the presence of attachable assets." *Texas Trading and Milling Corp.* v. *Federal Republic of Nigeria*, No. 80-7703 (2nd Cir. April 16, 1981), slip op. at 2602. The courts had jurisdiction, pursuant to 28 U.S.C. § 1332(a), over "civil actions . . . between (2) citizens of a state and foreign states or citizens or subjects thereof."

> Well, the claims of the U.S. nationals against foreign governments are frequently taken up and espoused by the U.S. Government as, in effect, a diplomatic claim—through diplomatic channels and sometimes they are paid. We have had numerous claims agreements with foreign countries in recent years; general claims settlements as such and also very specific cases. So that is an option [to attachments or execution] which is a realistic one.

Hearings Before the Subcommittee on Claims and Governmental Relations of the House Judiciary Committee on HR 3493: Immunities of Foreign States, 93rd Cong., 1st Sess. 26 (1973).[14]

Indeed, at the same time that the 94th Congress was considering the FSIA, it also was considering two bills, never enacted, to limit the power of the Executive to enter into executive agreements without congressional or Senate approval. Representatives of the State and Justice Departments submitted testimony and legal arguments to the Senate Judiciary Committee opposing the bills, and supporting, in the strongest possible terms, the authority of

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[14] Similarly, Peter N. Trooboff, Co-chairman of the Committee on Transnational Judicial Procedure of the American Bar Association, in supporting the FSIA, urged that the pending legislation would not affect the conduct of United States foreign relations. He stated:

> The bill would not have any effect on those many other foreign policy issues over which the State Department has control and which it can influence—on its own initiative or in response to actions by other governments. In its relations with other foreign states, the Department will continue to have a free hand in dealing with those issues. Thus, enactment of this legislation will in no way weaken the ability of the Department of State, in my judgment, to conduct the foreign relations of this Nation.

Hearings Before the Subcommittee on Administration Law and Governmental Relations of the House Committee on the Judiciary on HR 11315: Jurisdiction of U.S. Courts in Suits Against Foreign States, 94th Cong., 2nd Sess. 60 (1976).

the President to enter into executive agreements, including claims settlement agreements. *See Hearings Before Senate Subcommittee on Separation of Powers of the Committee on the Judiciary, Congressional Oversight of Executive Agreements—1975*, 94th Cong., 1st Sess. (1975). In particular, the Legal Advisor to the State Department asserted in categorical terms the power of the President to enter into claims settlement agreements without the participation of Congress. *Id.* at 306-311. He argued that the two leading cases supporting the President's power were *Belmont* and *Pink*, and further stated that the power "has been recognized by the United States Supreme Court, the Congress, enumerable scholars, and by a consistent practice dating from the early days of the Republic." *Id.* at 302.[15] He advised the Committee that the bills would be an unconstitutional limitation upon the Executive's constitutional powers. *Id.* at 304.

It is inconceivable that at the very time the State and Justice Departments were asserting before Congress the power of the Executive branch to enter into claims settlement agreements, they intended to abrogate that power by drafting and recommending enactment of the FSIA, without ever suggesting that the FSIA would undermine the Executive's claims settlement power. It is equally inconceivable that the very Congress which, after deliberation, did not limit the Executive's authority, in the face of warnings that it would be unconstitutional to do so, nevertheless intended to and did so limit that authority without ever stating anywhere that that was the intent or purpose of Congress.

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[15] See also the legal memorandum of the Justice Department, which argued that the *Belmont* decision "was not a narrow one . . ." (Id. at 304), and the Legal Advisor's Reply Memorandum, which emphasized the early historical acceptance of the claims settlement power by Jefferson and Adams, as well as the modern authority (Id. at 402-413).

It is significant that at the time of the enactment of the FSIA, Congress did not disturb the President's powers under the Trading With the Enemy Act (TWEA), 50 U.S.C. App. §5b, to freeze assets, or to nullify, void or prohibit any interests or judgments obtained by United States nationals. In fact, at the time of the enactment of the FSIA, there existed regulations freezing the assets of certain foreign states, barring attachments or judgment against such assets, and even barring the institution of lawsuits under certain circumstances. *See* Cuban Assets Control Regulations, 31 C.F.R. §515 *et seq.*, especially §515.504. *See*, to the same effect, 31 C.F.R. §§212, 500.504.

It is equally significant that one year *after* enactment of the FSIA, the Congress reenacted the TWEA in its entirety for periods of declared war and enacted the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §1702 *et seq.*, to be effective in periods of presidentially-declared emergencies. Congress explicitly recognized the continued vitality of the Executive's claims settlement power, stating that "nothing in this act [IEEPA] is intended by the committee . . . to impede the settlement of claims of U.S. citizens against foreign countries." Senate Rep. No. 95-466, 95th Cong., 2nd Sess. 6 (1977). Moreover, IEEPA explicitly ratified and grandfathered the then-existing foreign assets control regulations with respect to Cuban, Vietnamese and other foreign assets, which as we have noted, prohibited judicial attachments or judgments. 50 U.S.C. §1706(a).

Further, since the enactment of the FSIA, the President has entered into Executive agreements settling the claims of United States nationals against foreign governments. These agreements have met with Congressional praise. See Appendix B, at B-20-1. Moreover, Congress has amended the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621, *et seq.*, as amended (1980), looking forward to an eventual settlement by Executive agreement of claims against Vietnam. See Appendix B, at B-21.

Finally, Congress has acquiesced in the actions of two Presidents in entering into and implementing the Algerian Declarations. Presidents Carter and Reagan both submitted the reports to Congress required pursuant to the IEEPA, 50 U.S.C. § 1703(a)-(c). Congress never questioned the President's declaration of a national emergency, the renewals thereof, or the corresponding exercise of IEEPA powers in blocking, regulating, or licensing property in response to the declared emergency. In addition, Congress held hearings on the Algerian Declarations. *Hearings on the Algerian Declarations Before the Senate Committee on Foreign Relations*, 97th Cong., 1st Sess. (February 17 & 18, 1981) (unpublished); *Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs: Iranian Assets Settlement*, 97th Cong. 1st Sess. (February 19, 1981); *Hearings on the Algerian Declaration Before the House Committee on Foreign Affairs*, 97th Cong., 1st Sess. (February 19, 1981) (unpublished). No resolutions or legislation have been introduced pursuant to 28 U.S.C. § 1706 (b) to change, nullify or interfere with Executive actions requiring the transfer of assets pursuant to IEEPA. See Appendix B at B-23-25.

These actions of Congress simply confirm the obvious. The FSIA has nothing whatever to do with and does not derogate from the Executive's statutory and constitutional power to settle foreign claims in furtherance of overriding foreign and economic policy objectives of the United States.

Petitioner's argument that this court find such a limitation of an historic and settled Executive power within the interstices of the FSIA must be rejected:

> Absent clear and unequivocal evidence of Congressional intent [to limit the Executive] we are unwilling to announce a limitation on the President's powers to conduct the foreign affairs of this country.

Real v. *Simon,* 510 F.2d 556, 560 (5th Cir., 1975). *Cf., Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963); *Posados* v. *National City Bank,* 296 U.S. 493, 503 (1936).

POINT III

The Question of the Adequacy of the Compensation, if Any, Due to Petitioner Is Not a Basis for Judicial Interference With Implementation of the Executive's Actions.

Although the third question of the petition raises the issue of whether the Executive's actions amount to an unconstitutional taking of property, petitioner chose to make no further mention of it. This is not surprising, since petitioner clearly is not entitled to compensation on the attachment issue, and any claim of taking arising from the claims settlement is at the least premature. Moreover, petitioner must pursue a compensation claim initially in the Court of Claims, which would have exclusive jurisdiction over the matter.

A. *The Executive's Revocation of Petitioner's Conditional License to Attach Iranian Assets Which Previously Had Been Blocked by the Executive Does Not Constitute a Taking.*

Petitioner obtained its attachment after the Executive, acting pursuant to its statutory powers under IEEPA, had exercised control over Iranian assets by blocking and regulating them. Petitioner's attachment was obtained pursuant to a conditional license, which the Executive made clear could be revoked at any time. Petitioner therefore "had no reasonable expectation, that against the factual backdrop of an unresolved international crisis, the President would not revoke what he had granted. . . . Without a reasonable expectation that [its] restraints were protected, the [petitioner] cannot claim any property interests in those restraints. If so, the President took nothing on Jan-

uary 19." *American International Group* v. *Islamic Republic of Iran*, Nos. 80-1779, 1891 (D.C. Cir. June 5, 1981), slip op. at 38; *accord, Charles T. Main International, Inc.* v. *Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981) typescript op. at 12-13.

B. *No Determination Presently Can Be Made as to Whether Petitioner Would Suffer a Compensable Loss as a Result of the Claims Settlement Agreement.*

Bank Markazi takes no position on the question of whether petitioner is entitled to compensation from the United States if petitioner should suffer a loss as a result of the implementation of the claims settlement provisions of the Algerian Declarations. We note, however, that whether petitioner will suffer a loss of any kind is dependent on future events and necessarily is speculative. As the District of Columbia Circuit stated in the *American International Group* case:

> We have no reason to believe that the arbitration panel will not render meaningful relief. We have no reason to believe that the $1 billion security fund will not cover all meritorious claims. We have no reason to believe that the Iranians will not replenish the funds as they have agreed to do. We have no reason to believe that if they do not replenish the fund, then the prevailing claimants will be unable to obtain worldwide enforcement of any award according to the terms of the declarations. Finally, and by no means of least importance, we have no assurance that the appellees' claims are meritorious, and thus that executive action has taken anything of value.

Slip op. at 36; *accord, Charles T. Main*, typescript op. at 23-24.

Since petitioner's claim for compensation at this point is wholly speculative, the Court should adopt the course

followed by the District of Columbia and First Circuits and not decide it now.

C. *Even if Petitioner Does Suffer a Loss and Has a Right to Compensation, the Question of the Existence and Adequacy of Petitioner's Remedy Is a Political Question, Which the Political Branches Have Resolved by Establishing Exclusive Jurisdiction Over Petitioner's Claim in the Court of Claims.*

As we emphasized in Point II, the judiciary is bound to give effect to Executive action settling foreign claims. The question of the existence and adequacy of a remedy itself is a political question, wholly apart from the courts' obligation to give full effect to the executive orders.

In *Gray* v. *The United States*, 21 Ct. Cl. 340 (1886), the court addressed the issue of whether an agreement between the United States and France, in which the secured claims of United States nationals against French privateers were cancelled in exchange for France's release of the United States from certain treaty obligations, gave rise to an obligation on the part of the United States government to compensate United States citizens for the loss of their claims. The court went to great pains to underscore that the issue presented was a political question and that it was only because Congress had by statute directly authorized the court to render an advisory opinion that the court had any authority whatever:

> . . . The rights of the claimants, if any exist, arise from the acts of the political branch of the Government done in the protection and aid of the nation. For such rights there can be no remedy other than that granted by the legislature; in this instance the legislature has elected to transmit to the judiciary, under certain restrictions, the examination of the claimants' demands, with the proviso that the conclusion reached in this forum shall not be finally binding

> upon either party, but that the defendants, as well as the claimants, have reserved to them an appeal, not in the regular line of judicial procedure to the Supreme Court of the United States, but back again to that body, from which alone any remedy can come to the citizen for wrongs done him by his Government.
>
> The reason for this peculiar grant of remedy is found in the nature of the claims, which spring from international controversies of the gravest character intimately entwined with the history of our struggle for independence; also in the age of the claims; and, lastly, in the absolutely indeterminate amount of financial responsibility which will be thrown upon the Government should the claims be found to exist as valid obligations due from the United States to their citizens. Good or bad, not one of these claims is enforceable but by the consent of the Congress, and the Congress can affix to that consent such condition as in their wisdom seems just and for the best interests of the Republic. The remedy now granted is an examination and advisory report by the judiciary, to be followed by a decision by the legislative branch of the Government.

21 Ct. C. at 344-345. Here, as in *Gray*, if petitioner's rights have been violated, the remedy must come from the political branches of government.

In fact, the political branches *have* established a remedy for damages against the United States in the Court of Claims under the Fifth Amendment's Just Compensation Clause.[16] The Tucker Act, 28 U.S.C. § 1491, "guarantees an adequate remedy at law for any taking." *Regional Rail Reorganization Act* Cases, 419 U.S. 102, 149 (1974).

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[16] The Court of Claims is an Article III Court. 28 U.S.C. § 171; *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962).

The Tucker Act remedy would be available to assure compensation to the petitioner. An action for just compensation would not be precluded by 28 U.S.C. § 1502, because in order to invoke the jurisdictional bar of § 1502, "the right itself, which the petitioner makes to be the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation." *United States* v. *Weld,* 127 U.S. 51, 57 (1888).

Here, petitioner's claim, if any, against the United States does not have its origin in the Algerian Declarations or any treaty. To the contrary, like the plaintiffs in *Aris Gloves Inc.* v. *United States,* 420 F.2d 1386 (Ct. Cl. 1970), and *Hughes Aircraft Co.* v. *United States,* 534 F.2d 889 (Ct. Cl. 1976), petitioner can maintain only that the Algerian Declarations, to the extent relevant, deprive it of property interests. Section 1502 does not come into play at all.

CONCLUSION

The petitioner's constitutional challenge must be rejected. The Court is required to give full effect to the Executive's actions implementing the Algerian Declarations.

Dated: June 19, 1981

Respectfully submitted,

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APPENDIX A

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision[1]	Amount of Award or Settlement
November 19, 1794	Great Britain and United States	Treaty of Amity Commerce and Navigation (Jay Treaty) (1 Malloy, Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers 590 (1910)) (hereinafter "Malloy")	a) debts owed by American citizens to British subjects; b) claims of U.S. citizens based on illegal seizures of ships and other property by British government; c) claims of British citizens based on actions of U.S. government	Mixed Commission[2]	Yes	See G.B.-U.S., January 8, 1802 (Commission disbanded)
October 17, 1795	Spain and United States	Treaty of Friendship, Boundaries, Commerce and Navigation (2 Malloy 1640)	Maritime captures of U.S. vessels and cargoes by Spanish subjects during war	Mixed Commission	Yes	$325,440.07 to U.S. (Spanish Spoliations)
December 7 and 12, 1799*	Netherlands and United States	Case of the Schooner "Wilmington Packet" (5 Miller, Treaties and Other International Acts of the United States of America 1075 (1937)) (hereinafter "Miller")	Claims based on seizure of ship by Dutch privateer and condemnation of the ship's cargo by Dutch prize tribunal	Lump Sum Settlement	Yes	20,000 florins to U.S.
January 8, 1802	Great Britain and United States	Convention for Payment of Indemnities and Settlement of Debts (1 Malloy 610)	See G.B.-U.S., Jay Treaty November 19, 1794	Lump Sum Settlement and Mixed Commission	Yes	a) Lump sum of $2,664,000 to British citizens; b) By commission: $11,656,000 to U.S., $143,428.14 to G.B.

1 A treaty, executive agreement, or convention is said to have a binding provision if it contains a provision declaring the settlement mechanism specified in the agreement as a final and conclusive determination of the claims at issue.

2 A Mixed Commission consists only of representatives of the parties to the agreement.

* An asterisk is placed next to each executive agreement.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
August 11, 1802	Spain and United States	Claims Convention (2 Malloy 1650)	Mutual claims based on excesses committed by individuals of both nations during war	Mixed Commission	Yes	No award
April 30, 1803	France and United States	Convention for Payment of Sums Due by France to Citizens of the United States (1 Malloy 513)	Claims for debts owed U.S. citizens by French government for supplies, and claims based on seizures of ships and good by France	U.S. Commission	No	Approx. 20,000,000 French francs to U.S.
October 20, 1818	Great Britain and United States	Convention Respecting Fisheries, Boundary and the Restoration of Slaves (1 Malloy 631)	Claims for slaves of U.S. citizens taken by British troops during war (based on Treaty of Ghent of 1814)	Third Party Arbitration[3] (later referred to Emperor of Russia)	Yes	See G.B.-U.S., Nov. 13, 1826
February 22, 1819	Spain and United States	Treaty of Amity, Settlement and Limits (2 Malloy 1651)	Florida ceded to U.S.; Mutual claims for damages or injuries suffered up to date of treaty renounced by both governments; U.S. govt. agrees to pay claims of U.S. citizens up to $5,000,000	U.S. Commission	Yes	$5,454,545.13 of claims awarded pro-rata from $5,000,000 fund
July 12, 1822	Great Britain and United States	Convention for Indemnity Under Award of Emperor of Russia as to the True Construction of First Article of the Treaty of December 24, 1814 (1 Malloy 634)	Claims for slaves (see G.B.-U.S., October 20, 1818).	Mixed Commission	Yes	See G.B.-U.S., Nov. 13, 1826

3 Third Party Arbitration involves the resolution of a claim by some entity consisting of no representatives of the parties to the agreement.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
March 16, 1825*	United States and Colombia	Convention for Adjusting Certain Claims (3 Miller 195)	a) claim for cargo, loss of profit, injuries and damages of owners of Schooner Liberty; b) claims for vessel, cargo, loss of profit injuries and damages of owners of the Brig Josephine and Schooner Minerva respectively; c) claim for forfeited cargo to owner of cargo of Brig America	Lump Sum Settlement	(Colombia reserved right of action against individuals whose actions may have caused the settled claims)	$72,653.40 (plus interest) to U.S.
April 19 and 22, 1825*	United States and Russia	Exchange of Notes for the Settlement of the Claim in the case of the Brig "Pearl" (3 Miller 201)	Claim for cargo bound for Northwest coast which was left at Sandwich Islands after Russia representatives ordered American Brig Pearl to leave the area	Lump Sum Settlement	Yes	$16,994.69 to U.S.
November 13, 1826	Great Britain and United States	Convention Relative to Indemnity for Slaves (1 Malloy 641)	Claims for slaves (see G.B.-U.S. October 20, 1818)	Lump Sum Settlement	Yes	$1,204,960 to U.S.
March 17, 1828*	United States and Russia	Settlement of the Claims for the Brig "Hector" and the ship "Commerce" (3 Miller 421)	a) claim of owner of Brig "Hector" for cost of cargo, value of brig, lost profits; b) claim of owner of ship "Commerce" for the ship, freight and damage arising from capture of "Hector" and "Commerce" by vessels under the Russian flag	Lump Sum Settlement	Yes	205,731 rubles to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
June 15, 1829*	United States and Brazil	Settlement of Claims (3 Miller 485)	13 claims of owners and shippers for losses and damages suffered by the American ships Sarah George, Rio, Ruth, Hero, Panther Nile, Amity, Hussan, Pioneer, Spermo, Telltale, Hannah and Budget which were seized by Brazilian authorities	Confirmation of 13 claims agreements entered into by Mixed Commission	Yes	Total settlement of all 13 claims from the separate claims agreements Rs. 427,259,546 ($242,845.05) to U.S.
November 25, 1829*	United States and Colombia	Convention for Adjusting Certain Claims (3 Miller 523)	a) claims of owners of Brig "Josephine", owners of Schooner "Ranger" and their cargo for lost profit, injuries and damages resulting from seizure of ships by Colombian authorities	Lump Sum Settlement	Reserved right of owners of Brig Josephine to claim any additional interest to which they were entitled	$20,250.00 to U.S. for "Josephine" $5,013.59 to U.S. for "Ranger"
March 28, 1830	Denmark and United States	Claims Convention (1 Malloy 377)	Mutual claims for detention or confiscation of ships and other property under the authority of either government	Lump Sum Settlement	Yes	$650,000 Spanish milled dollars to U.S. (3 person U.S. Bd. of Commissioners to distribute)

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
July 4, 1831	France and United States	Convention as to Claims and Duties on Wines and Cotton (1 Malloy 523)	Mutual claims for detention or confiscation of ships and other property by either government	Lump Sum Settlement	Yes	25,000,000 francs to U.S.; 1,500,000 francs to France (distributed by each country to its own citizens)
January 19, 1832*	United States and Portugal	Settlement of Claims (3 Miller 653)	Claims for a) the capture of 4 U.S. ships by the squadron of Portugal - the "Ann", the "Galatea", the "Gleaner", the "Planter"; b) the clothing, and arrest and treatment of the crew of the "Galatea"	Lump Sum Settlement		"Ann" -$33,744.42 "Galatea"-$38,063.85 "Gleaner"-$7,250.00 "Planter"-$29,418.90 Clothing-$1,260.20 Arrest and treatment-$750.00 Total - $110,487.37 to U.S.
October 14, 1832	Two Sicilies (Italy) and United States	Claims Convention (2 Malloy 1804)	Claims for detention or confiscation of ships and other property from 1809-1812	Lump Sum Settlement	Yes	2,115,000 ducats to U.S. (distributed by U.S.)
February 17, 1834	Spain and United States	Claims Convention (2 Malloy 1659)	Adjustment of mutual claims from February 22, 1819 - date of this treaty	Lump Sum Settlement	Yes	12,000,000 rials vellon ($549,850.28 distributed by U.S.)
April 11, 1838	Texas (Republic) and United States	Claims Convention (2 Malloy 1779)	Claims based on seizure of ships and personal injuries by officers of govt. of Texas	Lump Sum Settlement	Yes	$11,750 to U.S. (distrib. by U.S.)

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
March 25, 1839*	United States and Netherlands	Settlement of the Claim for the Ship "Mary" and Her Cargo (4 Miller 179)	Claim for vessel and cargo captured by French privateer, taken to Curacao and sold there	Lump Sum Settlement	All future claims to be referred to U.S.	$62,692.00 to U.S.
April 11, 1839	Mexico and United States	Claims Convention (2 Malloy 1101)	Claims based on injuries to property and persons by Mexican authorities which had been presented to State Dept. or U.S. Ambassador to Mexico by the date of this convention	Mixed Commission with disputes to King to Prussia	Yes	See Mexico-U.S., Feb. 2, 1848
July 7, 1840*	United States and Chile	Agreement for the Settlement of the First Case of the Brig "Macedonian" (4 Miller 287)	Claim for seizures of money totalling $140,000 by Chilean soldiers	Lump Sum Settlement		$104,000 to U.S.
December 10, 1840*	United States and Chile	Agreement for the Settlement of the Case of the Brig "Warrior" (4 Miller 325)	Claim for seizure and detention of Brig "Warrior" by Chilean military	Lump Sum Settlement		$15,000 to U.S.
March 17, 1841	Peru and United States	Claims Convention (2 Malloy 1386)	Claims for detention, damage, or confiscation of ships and other property by order of govt. of Peru or unders its authority	Lump Sum Settlement	Yes	$421,432.41 to U.S. citizens (after adjudication by Attorney General)
October 15, 1842*	Brazil and United States	Seizure of "John S. Bryan" (5 Moore, International Arbitrations Digest (1898), 4613)	Claims for damages for seizure and detention of ship	Mixed Commission	No	$3,292.07 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
January 30, 1843	Mexico and United States	Claims Convention (1 Malloy 1105)	See Mexico-U.S., April 11, 1839, and claims presented by date of this new convention	Mixed Commission	N/A	See Mexico-U.S., Feb. 2, 1848
February 9, 1843*	United States and New Granada	Convention for the Settlement of Claims Arising Out of the Confiscation of Part of the Cargo of the Schooner "By Chance" (4 Miller 499)	Claim for confiscation of part of cargo belonging to U.S. citizens by New Granadian government	Lump Sum Settlement	Yes	$10,150 to U.S.
February 26 and 29 and March 1, 1844*	Venezuela and United States	Arrangement for the Settlement of the Case of the Brig "Morris" (4 Miller 523)	Claim for vessel Brig "Morris" and its cargo which were seized by Colombian privateer and subsequently sold	Lump Sum Settlement		$18,000 to U.S.
April 22, 1844*	New Granada and United States	Convention for the Settlement of the Claim Arising out of the Loss of Part of the Cargo of the Schooner "Henrietta" (4 Miller 555)	Claims for certain cargo, owned by U.S. citizen, on the Granadian Schooner "Henrietta" which was captured in Granadian civil war	Lump Sum Settlement	Yes	$1,243 to U.S.
November 5, 1844*	New Granada and United States	Convention for the Settlement of the Case of the Brig "Morris" (4 Miller 663)	Claim for Brig "Morris" and its cargo which were seized by Colombian privateer and subsequently sold	Lump Sum Settlement	Yes	$12,756.47 1/2 to U.S.
March 29, 1845*	New Granada and United States	Convention for the Settlement of Claims Arising out of the Seizure of the Schooner "Yankee" (4 Miller 741)	Claims for imprisonment and wages of crew of the schooner "Yankee", its cargo and freight charges	Mixed Commission	Yes	$10,891.00 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
November 10 and 26, 1845*	Great Britain and United States	Settlement of Claims (4 Miller 779)	Claims for excess duties levied by United States over British goods and claims for excess duties levied by Great Britain over United States goods	N/A	Yes	Each government pays claims of its own citizens
May 16, 1846*	New Granada and United States	Convention for the Final Settlement of the Case of the Brig "Josephine" (4 Miller 813)	Claims for nonpayment of certain interest suffered by those interested in the American Brig "Josephine"	Lump Sum Settlement	Yes	$6,569.14 to United States
November 16, 1846*	Venezuela and United States	Seizure of Brigs "Native" and "Josephine" (12 Bevans, Treaties and Other International Agreements of the United States of America 1776-1949 (1974), at 1052) (hereinafter "Bevans")	Claims based on seizure of cargo and ship by Venezuela	Lump Sum Settlements	Yes	$9,550 to U.S. for "Native"; $5,453 to U.S. for "Josephine"
February 2, 1848	Mexico and United States	Treaty of Guadalupe Hidalgo (1 Malloy 1107)	U.S. agrees to pay all claims of U.S. citizens against Mexico and discharges Mexico's obligations to U.S. citizens	U.S. Board of Commissioners	Yes	U.S. pays $3,208,314.96 to U.S. claimants
April 12, 1848*	Venezuela and United States	Convention upon the Claim Relative to the American Brig "Sarah Wilson" (12 Bevans 1056)	Claim based on detention and sale of ship and cargo by Venezuela	Lump Sum Settlement	Yes	$30,200 to U.S.
April 25, 1848*	New Granada and United States	Convention for the Settlement of the Case of the Brig "Native" (5 Miller at 437)	Claims arising out of the seizure of the Brig "Native" and its cargo by a Colombian vessel of war	Lump Sum Settlement	Yes	$16,000 to United States

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
January 27, 1849	Brazil and United States	Claims Convention (1 Malloy 144)	Claims of U.S. citizens	Lump Sum Settlement	Yes	530,000 milreis to U.S. (distributed by U.S.)
June 15, 1849*	Ecuador and United States	Settlement of Cases of Brig "Josephine" and Schooner "Ranger" (7 Bevans 308)	Claims for damages for seizure and detention of ship	Lump Sum Settlement	No Provision	$5,953 to U.S. for "Josephine"; $1,099 to U.S. for "Ranger"
July 7, 1849*	Venezuela and United States	Convention Upon the Claim Relative to the American Brig "Mount Vernon" (12 Bevans 1058)	Claim based on seizure and detention of ship and loss of cargo	Lump Sum Settlement	Yes	$11,500 to U.S.
February 9, 1850*	Ecuador and United States	Settlement of Case of Brig "Morris" (7 Bevans 310)	Claims based on capture and sale of ship by Colombian authorities	Lump Sum Settlement	Yes	$14,016 to U.S.
February 26, 1851	Portugal and United States	Claims Convention (2 Malloy 1458)	Pecuniary claims of U.S. citizens against govt. of Portugal; govt. claim for "Brig Armstrong"	Lump Sum Settlement (private claims); Third Party Arbitration by Pres. of France on Govt. claim	Yes	$91,727 to U.S.; no award on "Brig Armstrong" claim
May 1, 1852*	Venezuela and United States	Claims convention Relative to Schooner "Economy" and Others (12 Bevans 1060)	Claims based on confiscations of ships and cargoes	Lump Sum Settlement	Yes	$90,000 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
August 6, 1852*	Peru and United States	Agreement on Case of Samuel Franklin Tracy (10 Bevans 1017)	Claims based on losses sustained by Tracy for illegal arrest and for actions taken by govt. of Peru against his property	Lump Sum Settlement	Yes	$26,560 to U.S.
February 5, 1853*	Ecuador and United States	Settlement of Case of Brig "Native" (7 Bevans 312)	Claims based on seizure of ship by Colombian authorities	Lump Sum Settlement	Yes	$7,204 to U.S.
February 8, 1853	Great Britain and United States	Claims Convention (1 Malloy 664)	Mutual claims since The Treaty of Ghent 1814	Mixed Commission	Yes	$329,734.16 to U.S. $277,102.88 to G.B.
September 10, 1857	New Granada (Colombia) and United States	Claims Convention (1 Malloy 319)	General claims presented before Sept. 1, 1859 to the government of New Granada and claims for damages based on Panama riots of April 15, 1856	Mixed Commission	Yes	$496,235.47 to U.S.
November 8, 1858	China and United States	Claims Convention (1 Malloy 232)	General claims of U.S. citizens at ports of China	Lump Sum Settlement	Yes	$735,238.97 to U.S. (distrib. by U.S. of $489,187.95, surplus returned)
November 10, 1858	Chile and United States	Convention for Arbitration of Macedonian Claims (1 Malloy 183)	Claims based on seizure of silver from U.S. citizen by Chilean Admiral Cochran	Third Party Arbitration by King of Belgium	Yes	$42,400 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
January 14, 1859	Venezuela and United States	Claims Convention (2 Malloy 1843)	Claims of U.S. citizens for damages caused by their eviction from Aves Island	Lump Sum Settlement	Yes	$130,000 to U.S.
February 4, 1859	Paraguay and United States	Claims Convention (2 Malloy 1362)	Claim of "United States and Paraguay Navigation Company" (U.S. company) that its property was damaged by actions of Paraguay's govt.	Mixed Commission	Yes	No award
July 2, 1860	Costa Rica and United States	Claims Convention (1 Malloy 346)	Claims for property damage and personal injuries caused by authorities of Costa Rica	Mixed Commission (disputes on choice of 3rd commissioner to King of Belgium)	Yes	$25,704.14 to U.S.
November 25, 1862	Ecuador and United States	Claims Convention (1 Malloy 432)	Mutual pecuniary claims upon each government	Mixed Commission (disputes on choice of umpire to British Minister)	Yes	$94,799.56 to U.S.
December 20, 1862	Peru and United States	Claims Convention (2 Malloy 1406)	Claims based on seizure and confiscation of ships "Lizzie Thompson" and "Georgiana" by govt. govt. of Peru	Third Party Arbitration by King of Belgium	Yes	No award
January 12, 1863	Peru and United States	Claims Convention (2 Malloy 1408)	Mutual pecuniary claims against each government	Mixed Commission	Yes	$57,196.23 to U.S.; $25,300 to Peru
July 1, 1863	Great Britain and United States	Treaty for Settlement of Claims with the Hudson Bay Co. (1 Malloy 688)	Claims of British companies for compensation for land given to U.S. under G.B.-U.S. Treaty of June 15, 1846	Mixed Commission	Yes	$650,000 to British companies

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
February 10, 1864	Colombia and United States	Claims Convention (1 Malloy 321)	Claims based on Panama riots	Mixed Commission	Yes	$88,267.88 to U.S.
May 4, 1864*	Salvador and United States	Government Monopoly, Arbitration of Claim of Mr. Savage. (2 Moore 1855)	Personal claim for gunpowder that was nationalized	Third Party Arbitration by Guatemala	N/A	$4,497.50 to U.S. (to Savage)
April 25, 1866	United States and Venezuela	Claims by Citizens of the United States against the Government of Venezuela (2 Malloy 1856)	Pecuniary claims of U.S. citizens	Mixed Commission (disputes on choice of umpire to Russia or Switz.)	Yes	$1,253,310.30 to U.S.
July 4, 1868	Mexico and United States	Claims Convention (2 Malloy 1128)	Mutual pecuniary claims for injuries to persons and property by authorities of either country since Treaty of Guadalupe Hidalgo in 1848	Mixed Commission	Yes	$4,125,622.20 to U.S.; $150,498.41 to citizens of Mexico
December 4, 1868	Peru and United States	Claims Convention (2 Malloy 1411)	Mutual pecuniary claims since 1863 Commission	Mixed Commission (Disputes to 3rd Nation)	Yes	$194,417.62 to U.S.; $57,040 to Peru
March 14, 1870*	Brazil and United States	Protocol for Submission to Arbitration of Claim Over the "Canada" (5 Moore 4687)	Claim based on seizure of ship and sale of cargo by Brazil	Third Party Arbitration by British Ambassador	Yes	21,150 pounds to U.S.
May 25-June 16, 1870*	Spain and United States	Detention of Ship, "Colonel Lloyd Aspinwall" (2 Moore 1007)	Claim based on detention of ship	Mixed Commission	No	$19,702.50 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
February 12, 1871*	Spain and United States	Agreement for Settlement of Certain Claims of Citizens of U.S. on Account of Wrongs and Injuries Committed by Authorities of Spain in the Island of Cuba (2 Malloy 1661)	Claims arising out of Cuban insurrection for damages to property and injuries to persons by authorities of Spain	Mixed Commission	Yes	$1,293,450.55 to U.S.
May 8, 1871	Great Britain and United States	Treaty of Washington (1 Malloy 700)	"Alabama" claims based on British failure to maintain neutrality in Civil War and mutual pecuniary claims after Civil War	Joint Commission[4]	Yes	$1,929,819 to Great Britain; $15,500,000 to U.S.
December 6, 1873*	Chile and United States	Protocol for Submission to Arbitration of Claim for the Ship "Good Return" (2 Moore 1466)	Claims based on seizure of ship	Third Party Arbitration by Italian Consul in Chile, then lump sum settlement	No Provision	$18,229.16 to U.S.
August 17, 1874*	Colombia and United States	Seizure and Detention of Ship "Montijo" (5 Moore 4698)	Claims based on seizure and detention of ship	Mixed Commission	Yes	$33,401 to U.S.
February 27, 1875*	Spain and United States	Agreement-The Steamer Virginius (2 Malloy 1664)	Claims based on seizure of ship	Lump Sum Settlement	Yes	$80,000 (to be distributed by U.S. government)
January 15, 1880	France and United States	Claims Convention (1 Malloy 535)	Mutual pecuniary claims based on actions of either country during a) Franco-German War of 1870-71, b) the "Insurrection of the Commune", c) the France-Mexico War	Joint Commission	Yes	$625,566.35 to France, 13,659 francs to U.S.

4 A Joint Commission consists of representatives of the parties to an agreement and a representative of at least one other nation.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
May 28, 1881*	Great Britain and United States	Claims of American Fisherman (1881 For. Rel. 591)	Claims based on disturbance of Amer. fishing operations by British subjects in Newfoundland	Lump Sum Setttlement	Yes	$15,000 to U.S.
1884 (award May 24, 1884)	China and United States	Ashmore Fishery Claim (2 Moore 1857)	Claim for compensation for giving up title to fishery ground	Third Party Arbitration by Ambassadors from G.B. and Netherlands	No Provision	$4,600 to U.S. (to Ashmore)
May 28, 1884*	Haiti and United States	Protocol of an Agreement for Submission to an Arbitration of the Claims of Pelletier and Lazare against Haiti (1 Malloy 932)	Claims for illegal arrest, seizure of properties, and breach of contract by Haitian authorities	U.S. Arbitrator	Yes	$57,250 to Pelletier, $117,500 to Lazare (both set aside by U.S. Sec. of State)
November 17-25, 1884*	Spain and United States	Detention and Sale of Ship "Masonic" (2 Moore 1055)	Claims based on detention and sale of ship	Third Party Arbitration	No Provision	$51,674.07 to U.S.
January 25, 1885*	Haiti and United States	Civil Disturbances (2 Moore 1859)	Claims against Haiti for property damage and personal injury after riots	Mixed Commission	No Provision	$14,700 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
December 5, 1885	United States and Venezuela	Claims Convention (2 Malloy 1858)	Pecuniary claims of U.S. citizens	Mixed Commission disputes over choice of 3rd Comm. to Russia or Switz.	Yes	$980,572.60
December 5, 1885 and October 5, 1888	Venezuela and United States	Review Commission (2 Malloy 1858 and 1866)	Pecuniary claims of U.S. citizens	Extension of prior commission	Yes	See U.S.-Venezuela Dec. 5, 1885
November 29, 1886 and December 7, 1886	Spain and United States	Claim of Antonio Maximo Mora (Moore, Treaties and Executive Agreements, 1905 Political Science Quarterly 385)	Claim of individual based on embargo of his property in Cuba	Lump Sum Settlement		$1,500,000 to U.S.
April 9, 1888	Morocco and United States	Illegal Arrest (Darby, International Tribunals 505 (3rd ed. 1900)) (hereinafter "Darby")	Claim based on arrest of American consul by Moorish authorities	Mixed Commission		
May 24, 1888*	Haiti and United States	Protocol of an Agreement for Submission to an Arbitrator of the claim of Charles Adrien Van Bokkelen (2 Moore 1813; 1 Malloy 935)	Claim based on arrest and imprisonment	Referee	Yes	$60,000 to U.S.
December 6, 1888	Denmark and United States	Agreement Submitting Claim of Carlos Butterfield & Co. to Arbitration (1 Malloy 387)	Seizure and detention of ships "Ben Franklin" and "Barque Catherine Augusta" by the authorities of the island of St. Thomas of the Danish West Indies	Third Party Arbitration by British Ambassador in Greece	Yes	No Award
August 13, 1890	Great Britain and United States and Portugal	Railway Concession (Darby 506)	British and U.S. claims based on rescission of railway concession and seizure of the railroad by Portuguese govt.	Third Party Arbitration by Swiss Confederation		28,000 pounds (on account) to U.S. and G.B.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
June 13, 1891*	United States and Great Britain vs. Portugal	Protocol Between the United States, Great Britain, and Portugal in Reference to Arbitration of Claims Against Portugal (2 Malloy 1460)	British and U.S. claims based on rescission of railway concession by Portugal	Third Party Arbitration by Swiss confederation	Yes	15,314,000 Swiss francs to G.B. and U.S.
January 19, 1892	United States and Venezuela	Claims Convention - Venezuelan Steam Transportation Company (2 Malloy 1868)	Claims based on seizure of ships and other property, and imprisonment of U.S. citizens	Mixed Commission (with 3rd Nation)	No	$141,800 to U.S.; $300 to Venezuela
August 7, 1892, May 24, 1897	Chile and United States	Claims Convention (1 Malloy 185)	Mutual pecuniary claims based on acts of civil or military authorities of either country	Mixed Commission	Yes	$240,564 to U.S.
February 28, 1893	Ecuador and United States	Claims Convention - Julio R. Santos (1 Malloy 438)	Claim of individual based on wrongful imprisonment and injuries to person and property by authorities of Ecuador	Third Party Arbitration by British Ambassador in Ecuador	Yes	$40,000 to U.S.
March 2, 1897*	Mexico and United States	Protocol Concerning Claims of Oberlander and Messenger (2 Malloy 1180)	Claims based on personal injuries to Oberlander and Messenger by Mexican citizens	Third Party Arbitration by Minister of Argentina at Madrid	Yes	No award
May 24, 1897*	Chile and United States	Claims Protocol (1 Malloy 190)	Claim of Patrick Shields for personal damages	Lump Sum Settlement of individual claim	Yes	$3,500 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
June 14, 1897	Ecuador and United States	Guayaquil and Quito Railway Co.	Claims of U.S. citizens based on spoliation of property and property rights by virtue of taking by Ecuador of the railway	Mixed Commission	No Provision	
July 26, 1897*	Siam and United States	Protocol Concerning Claim of Cheek (Darby 514)	Claim of Cheek based on seizure of property and interference with his teak concession; claim of Siam based on breach of loan agreement	Third Party Arbitration by Chief Justice of G.B.'s Sup. Ct. for China and Japan	Yes	706,721 tieals to U.S. ($200,000)
September 20, 1897 (date of award)	Siam and United States	Military Assault (Darby 514)	Claim based on attack by Siamese soldiers on Mr. E.V. Kellet	Mixed Commission		In favor of U.S.
February 1898*	Dominican Republic and United States	Ozama River Bridge (7 Bevans 183)	Claim based on interference by Dominican Rep. govt. with concession to build and operate a bridge	Mixed Commission	No Provision	$74,411.17 to U.S.
May 17, 1898*	Peru and United States	Protocol of an Agreement for the Arbitration of the Amount of Damages to be Awarded in Favor of Victor H. MacCord (2 Malloy 1443)	Claim for personal injuries caused by Peruvian authorities	Third Party Arbitration by Chief Justice of Canada	Yes	$40,000 to U.S.
December 10, 1898	Spain and United States	Treaty of Peace (2 Malloy 1690)	Mutual claims arising out of insurrection in Cuba - Spain and U.S. mutually relinquish all claims of their citizens against each other	N/A	Yes	U.S. to pay all claims of its citizens

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
October 18, 1899 and June 30, 1900*	Haiti and United States	Protocol of an Agreement Between the United States and Haiti, For The Arbitration of the Question of the Liability and Amount of Damages to be Awarded John D. Metzger and Company (8 Bevans 646)	Claims for seizure and sale of goods, and for breach of contract for sale of lumber by Haitian govt.	U.S. Arbitrator	Yes	$23,000 to U.S.
November 7, 1899	Germany, Great Britain, and United States	Convention Between United States, Germany and Great Britain Relating to Settlement of Samoan Claims (2 Malloy 1589)	Personal claims based on military action of the three nations in the Samoan Island	Third Party Arbitration by King of Norway and Sweden	No	U.S. and G.B. responsible for losses
February 23, 1900 and May 10, 1900*	Guatemala and United States	Protocol of an Agreement Submitting to Arbitration The Claim of Robert H. May Against Guatemala and the Claim of Guatemala Against Said May (1 Malloy 871 and 873)	Mutual claims based on contracts in connection with the Guatemala Northern Railroad (claim of May was against Guatemalan govt.)	Third Party Arbitration by British Consul to Guatemala	Yes	$143,750.73 to U.S.
March 22, 1900*	Nicaragua and United States	Protocol of an Agreement for the Arbitration of the Amount of Damages to be Awarded Orr and Laubenheimer and the Post-Glover Electric Company (2 Malloy 1290)	Claims based on seizures of property by Nicaragua, including ships "Buena Ventura" and "Alerta" and other goods	Third Party Arbitration	Yes	$6,963 to Orr, $1,402.94 to Company

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
September 8, 1900*	Russia and United States	Claims Protocol (2 Malloy 1532)	Claims based on seizure of ships "James Hamilton Lewis", "C.H. White", "Kate and Anna", "Cape Horn Pigeon"	Third Party Arbitration by Mr. Asser of the Netherlands	No	$38,650 to "Pigeon", $28,588 to "Lewis", $32,444 to "White", $1,448 to "Kate"
September 7, 1901*	United States and China	Boxer Claims (1 Bevans 302)	Claims for damages to property and persons (protocol covered claims of Germany, Austria-Hungary, Belgium, Spain, France, G.B., Italy, Japan, Netherlands, Russia, and United States)	U.S. Commission (for American claimants)	No Provision	Total of 450,000,000 taels to all powers (some to U.S. claimants)
December 19, 1901*	Salvador and United States	Protocol for the Arbitration of Certain Claims Against Salvador (2 Malloy 1568)	Claims of Salvador Commercial Co. and other U.S. citizens for damages	Joint Commission	Yes	$537,178.64 to claimants
February, 1902*	Salvador and United States	Claim of Rosa Gelbtrunk (1902 Foreign Relations of the United States 873)	Claim of Rosa Gelbtrunk	Joint Commission	No Provision	No award
April 28, 1902*	Dominican Republic and United States	Arbitration of Sala Claim (7 Bevans 184)	Claim of Madam de Sala as surviving partner of J. Sala & Co. for debts owed by Dominican Government	Mixed Commission	No Provision	$215,812.95

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
May 22, 1902*	Mexico and United States	Protocol for the Adjustment of Certain Contentions Arising Under What is Known as the "Pious Fund of the Californias" (2 Malloy 1194)	Claim for interest upon an annual fund	Mixed Commission and umpire from the Hague	Yes	$1,420,682.67 lump sum and $43,050.99/year to U.S.
September 6, 1902*	United States and Brazil	Protocol Submitting to Arbitration the Claim of George C. Benner et al. (1 Malloy 152)	Claim based on damage to vessel "James A. Simpson" from shooting by Brazilian soldiers	Third Party Arbitration by Swedish Envoy to U.S.	Yes	No award
January 31, 1903*	Dominican Republic and United States	Arbitration Protocol - Claim of San Domingo Improvement Co. (1 Malloy 414)	Claim for damages for withdrawal of Co. from Dominican Republic; indemnity for relinquishment of rights, properties, and interests	Lump sum settlement and Arbitration of Terms	Yes	$4,500,000 to U.S., relinquishment by Co. of all rights, properties & interest
February 17, 1903*	United States and Venezuela	Protocol with Venezuela Submitting to Arbitration Claims Against Venezuela (2 Malloy 1870)	Claims of U.S. citizens	Mixed Commission (umpire named by Queen of Netherlands)	Yes	$2,313,711.37
May 7, 1903*	Venezuela and Great Britain, United States, et al.	Protocols of Agreements Respecting the Reference of the Question of the Preferential Treatment of Claims to the Tribunal at the Hague (2 Malloy 1872)	Order of preference between nations (choice between Blockading Powers and Creditor Powers)	Arbitration by Tribunal at the Hague (chosen by Emperor of Russia)	Yes	Germany, G.B. and Italy get preference from 30% of Venezuelan customs revenues
November 25, 1904*	Honduras and United States	Cases of Charles W. Renton and Jacob Baiz (8 Bevans 888)	Claims of U.S. citizens	Lump Sum Settlement	Yes	120,000 pesos to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
February 13, 1909*	Venezuela and United States	Claims Protocol (2 Malloy 1881)	Claims of U.S. companies (Orinoco Steamship Co., Orinoco Corporation, and United States and Venezuela Company) based on contracts for mining in Venezuela	3 Arbitrators from Permanent Court of Arbitration at the Hague	Private Settlement Allowed	$475,000 to U.S. and Venezuela Company; $385,000 to Orinoco Company
May 25 and September 18, 1909*	Nicaragua and United States	Protocol for Arbitration of the Claim of the George D. Emery Company (10 Bevans 365)	Claim for damages based on annulment of timber concession by govt. of Nicaragua	Mixed Commission (disputes over choice of 3rd comm. to King of G.B.); then Lump Sum Settlement	Yes	$600,000 to U.S.
December 1, 1909*	United States and Chile	Protocol for Arbitraton of the Alsop Claim (6 Bevans 548)	Claim of Alsop & Co. for property losses	Third Party Arbitration by King of G.B.	Yes	2,275,375 bolivanos to U.S.
August 18, 1910	Great Britain and United States	Special Agreement for the Submission to Arbitration of Pecuniary Claims (3 Malloy 2619)	Mutual pecuniary claims based on denials of property rights, alleged wrongful collection of customs duties and other charges, and damages to property or persons by the military of either nation	Mixed Commission (disputes over choice of Umpire to the Hague)	Yes	
January 28, 1911*	China and United States	Agreement in Settlement of Changsha Indemnity Claims (3 Malloy 2512)	Claims of U.S. citizens after disturbances in Hunan province led to property damage	Specified Individual Settlements	Yes	$74,392.53 (or 53,934.58 Hankow taels)

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
April 4, 1911	Nicaragua and United States	Claims Commission (U.S. For. Rel. 1911-631; 10 Bevans 374)	Claims for damages based on abolition of monopolies, concessions, and leases by Nicaragua	Mixed Commission	No Provision	3 awards to Nicaragua, rest to U.S.
November 27, 1915*	Panama and United States	Protocol Providing for the Determination of the Amount of Damages Caused by the Riot at Panama City, July 4, 1912 (3 Malloy 2778)	Claims for deaths and injuries due to riot, Panama concedes liability, issue as to damages	Third Party Arbitration by Netherlands	Yes	$12,500 to U.S.
October 3, 1919*	Haiti and United States	Protocol for the Establishment of a Claims Commission (3 Malloy 2678)	Pecuniary claims of U.S. citizens and subjects	Joint Commission	No	Payable out of $40,000,000 national loan
May 21, 1921*	Peru and United States	Protocol for the Arbitration of the Landreau Claim Against Peru (3 Malloy 2797)	Claims for rewards owed for discovery of guano deposits and for breach of contract by govt. of Peru	Joint Commission	Yes	$125,000 to U.S.
August 10, 1922*	Germany and United States	Agreement for a Mixed Commission to Determine the Amount to be Paid by Germany in Satisfaction of Germany's Financial Obligations under the Treaty Concluded Between the Two Governments on August 25, 1921 (3 Malloy 2601)	Claims based on treaty of peace for damage to or loss of property, and debts	Mixed Commission	Yes	More than $265,939,068.37 to U.S.
September 8, 1923	Mexico and United States	General Claims Convention (U.S. Treaty Series, 678; 4 Malloy 4441)	Mutual pecuniary claims for losses or damages to persons or property since July 4, 1868	Mixed Commission (disputes over choice of 3d commissioner to the Hague)	Yes	

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
September 10, 1923	Mexico and United States	Special Claims Convention for the Settlement of Claims of American Citizens Arising from Revolutionary Acts in Mexico from November 20, 1910 to May 31, 1920 (U.S. Treaty Series, 676; 4 Malloy 4445)	Claims for losses or damages to persons or property arising out of the revolution in Mexico	Mixed Commission (disputes over choice of 3d commissioner to the Hague)	Yes	See U.S.-Mex. April 24, 1934
December 24, 1923*	Turkey and United States	American Claims (H.R. Doc. No. 283, 73d Cong., 2 Sess. p. 3; 11 Bevans 1105)	Mutual pecuniary claims of nationals of both countries	Mixed Commission	No Provision	$1,300,000 to U.S.
November 26, 1924*	Austria-Hungary and United States	Agreement Concerning Obligations (U.S. Treaty Series, 730; 4 Malloy 3928)	Claims of U.S. nationals for damage or seizure of property, death or injury of persons, and debts	Third Party Arbitration	Yes	$370,032.14 to U.S. from Austria; $443,588.79 to U.S. from Hungary
July 28, 1926	Panama and United States	Convention on Claims (4 Malloy 4546; U.S. Treaty Series No. 842)	Mutual pecuniary claims based on losses or damages to persons or property since Nov. 3, 1903; Claims for losses of U.S. citizens due to fire in city of Colon on March 31, 1885	Mixed Commission; Joint Commission (with Colombia for Colon fire)	Yes	
January 2, 1927	Cuba and United States	Attempted Expropriation of Property	Claims of Smith for land seizure	U.S. Arbitrator	No Provision	$190,000 to U.S.
May 19, 1927*	Great Britain and United States	Arrangement for the Disposal of Certain Pecuniary Claims Arising Out of the Recent War (Detention of the S.S. "Lisman", Capture of U.S.S.S. "Edna", Capture of U.S.S.S. "Seguranca") (4 Malloy 4256)	Mutual agreement not to present claims of nationals, and to use funds saved to pay such claims of a country's own nationals	N/A	N/A	

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
March 30, 1928*	China and United States	American Claims for Acts of Chinese Soldiers (MSS Dept. of State)	Claims based on damages to persons and property by Chinese soldiers	Mixed Commission		$443,588.79 to U.S.
June 20, 1929*	Spain and United States	Outstanding Claims (Executive Agreement Series #18; 11 Bevans 687)	Mutual claims	Mixed Commission	No Provision	
October 1, 1929*	Cuba and United States	Indemnity for Damages (49 Arbitration Series #1, MSS Dept. of State)	Claim of Charles Harrah for wrongful destruction of his property by Cuban authorities	Mixed Commission		$350,000 to U.S.
November 22, 1929*	Guatemala and United States	Case of P. W. Shufeldt (8 Bevans 507)	Claim of breach of contract for illegal cancellation of concession for extraction and exportation of chicle against the govt. of Guatemala	Third Party Arbitration by Chief Justice of Sup. Ct. of British Honduras	No Provision	$225,468.38 to U.S.
January 20, 1931*	Egypt and United States	Damages Resulting from Acts of the Egyptian Authorities against George J. Salem (Executive Agreement Series #33)	Claim of Salem for mistreatment by Egyptian authorities and courts	Mixed Commission		No award
November 16, 1933*	U.S.S.R and United States	Litvinov Assignment (11 Bevans 1257)	U.S. gives up claims based on Soviet nationalizations of property of U.S. nationals; U.S.S.R. assigns to U.S. amounts that may be due from U.S. nationals to U.S.S.R.	N/A	N/A	N/A

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
April 24, 1934	Mexico and United States	Convention Providing for En Bloc Settlement of Special Claims (5 Malloy 4487)	General claims of U.S. nationals from Special Claims Convention of Sept. 10, 1923	Lump Sum Settlement	Yes	Based on percentage Mexico recovered from other nations
April 10, 1935	Mexico and United States	Claims Arising from Revolutionary Acts (Amer. J. Int'l Law, Off. Doc. 1938-107)	Claims of U.S. nationals except those from other settlements	U.S. Claims Commission	No Provision	
April 15, 1935	Canada and United States	Claims: Damages Resulting From Operation of Smelter at Trail, British Columbia (6 Bevans 60)	Claims based on damages caused by fumes from smelter of the Consolidated Mining and Smelting Co.	Lump Sum Settlement (for damages prior to Jan. 1, 1932); Mixed Commission	No Provision	$350,000 to U.S. for pre-Jan. 1, 1932 damages; No award for post-Jan. 1, 1932 damages
November 9, and 12, 1938*	Mexico and United States	Compensation for Expropriated Lands (9 Bevans 1038)	Claims based on expropriations of agrarian land by Mexican govt.	Mixed Commission	No Provision	See U.S. Mexico Nov. 19, 1941
November 19, 1941	Mexico and United States	Final Settlement of Certain Claims (9 Bevans 1059)	Claims filed by U.S. and Mexico with commission established Sept. 8, 1923; agrarian claims of U.S. nationals against govt. of Mexico which arose between Aug. 30, 1927 and Oct. 7, 1940; mutual claims for property damage caused by acts of either govt. between Jan. 1, 1927 and Oct. 7, 1940	Lum Sum Settlement	Yes	$40,000,000 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
November 19, 1941*	Mexico and United States	Expropriation of Petroleum Properties (9 Bevans 1055)	Claims based on right to compensation for expropriation of petroleum properties by Mexico	Experts from Both Countries	Yes	See U.S.-Mexico Sept. 25 and 29, 1943
Sept. 25 and 29, 1943	Mexico and United States	Payment for Expropriated Petroleum Properties (9 Bevans 1150)	See U.S.-Mexico Nov. 19, 1941	Lump Sum Settlement	Yes	$23,995,991 to U.S.
August 14, 1947	Italy and United States	Agreement on Claims of U.S. Nationals (The Lombardo Agreement) (61 Stat. 3988; 36 U.N.T.S. 105)	Claims of U.S. nationals arising out of WWII against both Italy and Italian nationals	Mixed Commission	No Provision	$5,000,000 to U.S. (claims determined by Foreign Claims Settlement Commission (FCSC)
July 19, 1948*	Yugoslavia and United States	Agreement Regarding Pecuniary Claims of the United States and its Nationals (Lillich and Weston, International Claims: Their Settlement by Lump Sum Agreements, Part II, 10 (hereinafter "Lillich and Weston"); 62 Stat. 2658, T.I.A.S. No. 1803)	Claims of U.S. nationals based on nationalizations and other takings by Yugoslavia of property of U.S. nationals	Lump Sum Settlement	Yes	$17,000,000 to U.S. (U.S. claims determined by International Claims Commission (ICC) and later by FCSC)
January 26, 1950	Panama and United States	Agreement Regarding Pecuniary Claims (Lillich and Weston, 35; 1 U.S.T. 685, T.I.A.S. No. 2129)	Mutual claims: Panama claim for fire damage; U.S. claims of injuries, seizures of property, and nationalizations	Lump Sum Settlement	Yes	$53,800 to Panama; $3,156 to U.S. for injuries; $400,000 to U.S. for property (claims determined by ICC and FCSC)

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
February 27, 1953	Germany and United States	Settlement of Indebtedness of Germany for Awards Made by the Mixed Claims Commission (4 U.S.T. 908; T.I.A.S. 2796)	Claims based on bonds issued for pre-war indebtedness of Germany to U.S. nationals	Lump Sum Settlement	Yes	$97,500,000 to U.S.
March 30, 1960*	Rumania and United States	Agreement Relating to Financial Questions Between the Two Countries (Lillich and Weston, 217; 11 U.S.T. 317; T.I.A.S. No. 4451)	Claims of U.S. nationals based on contracts acquired prior to Sept. 1, 1939 and payable prior to Sept. 15, 1947, and nationalizations and other takings by Rumania of property of U.S nationals	Lump Sum Settlement	Yes	$24,526,370 to U.S. ($22,026,370 from blocked assets)($2,500,000 in 5 annual installments) (claims determined by FCSC)
July 16, 1960*	Poland and United States	Agreement on Claims of United States Nationals (Lillich and Weston, 227; 11 U.S.T. 1953; T.I.A.S. No. 4545)	Claims of U.S. nationals based on nationalizations and other takings by Poland of property of U.S. nationals; and debts owed by nationalized enterprises	Lump Sum Settlement	Yes	$40,000,000 to U.S. (in 20 annual installments) (claims determined by FCSC)
July 2, 1963*	Bulgaria and United States	Agreement on Claims of United States Nationals (Lillich and Weston, 266; 14 U.S.T. 969; T.I.A.S. No. 5387)	Claims of U.S. nationals based on contracts, and nationalizations by Bulgaria of property of U.S. nationals	Lump Sum Settlement	Yes	$3,543,398 to U.S. ($3,143,398 from blocked assets) (claims determined by FCSC)
November 5, 1964*	Yugoslavia and United States	Agreement on Claims of United States Nationals (Lillich and Weston, 308; [1965] 1 U.S.T. 1; T.I.A.S. No. 5750)	Claims of U.S. nationals based on nationalizations by Yugoslavia of property of U.S. nationals between July 19, 1948 and date of this agreement	Lump Sum Settlement	Yes	$3,500,000 to U.S. (5 annual installments)

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
March 25, 1965	Canada and United States	Agreement Concerning the Establishment of an International Arbitral Tribunal to Dispose of United States Claims Relating to Gut Dam (17 U.S.T. 1566; T.I.A.S. 6114)	Damages caused to real property of U.S. citizens by construction and maintenance of Dam	Mixed Commission (disputes over choice of 3rd member to Int'l Ct. of Justice)	No (claimant may accept decision of tribunal as final)	See U.S.-Canada, Nov. 18, 1968
November 18, 1968*	Canada and United States	"Gut Dam" Settlement (Lillich and Weston, 360; 19 U.S.T. 7863; T.I.A.S. No. 6624)	See above	Lump Sum Settlement	No	$350,000 to U.S.
April 18, 1969*	Japan and United States	Agreement Concerning the Trust Territory of the Pacific Islands (20 U.S.T. 2654; T.I.A.S. No. 6724)	Claims of nationals of U.S. trust territory of the Pacific Islands arising out of WWII	Lump Sum Settlement	Yes	$5,000,000 from U.S. to trust territory; $5,000,000 from Japan to trust territory
March 6, 1973*	Hungary and United States	Agreement Regarding the Settlement of Claims (24 U.S.T. 522; T.I.A.S. 7569)	Claims of U.S. nationals based on contracts acquired prior to Sept. 1, 1939 and payable prior to Sept. 15, 1947, and nationalizations by Hungary of property of U.S. nationals	Lump Sum Settlement	Yes	$18,900,000 to U.S. (also Hungary drops claim for $3,318,614 in blocked assets) (claims determined by FCSC)
February 19, 1974*	Peru and United States	Claims Settlement (25 U.S.T. 227; T.I.A.S. 7792)	Claims of U.S. nationals and Peru based on road construction contracts; claims of U.S. nationals of nationalizations and expropriations by Peru of property of U.S. nationals	Lump Sum Settlement	Yes	$76,000,000 to U.S. (distrib. by U.S. Sec. of State); Peru drops claims against U.S. nationals

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
May 1, 1976*	Egypt and United States	Claims Settlement 27 U.S.T. 4214; T.I.A.S. 8446)	Claims of U.S. nationals based on Egyptian nationalizations and expropriations of property of U.S. nationals	Lump Sum Settlement	Yes	$10,000,000 to U.S. (six semi-annual installments) distrib. by U.S. as it chooses
September 22, 1976*	Peru and United States	Agreement Regarding Claim of Marcona Mining Company (27 U.S.T. 3993; T.I.A.S. 8417)	Claim based on nationalization of assets of Marcona Mining Co. by Peru	Lump Sum Settlement	Yes	$61,440,000 to U.S.
May 11, 1979*	People's Republic of China and United States	Agreement Concerning the Settlement of Claims (T.I.A.S. No. 9306 (1979))	Claims of U.S. nationals based on Chinese nationalizations and expropriations of property of U.S. nationals between October 1, 1949 and May 11, 1979	Lump Sum Settlement	Yes	$80,500,000 to U.S. (accompanied by release of blocked assets)
May 19, 1979*	Egypt and United States	Agreement Concerning the Settlement of Claims (T.I.A.S. No. 9589)	Claims of U.S. nationals reserved by May 1, 1976 Egypt-U.S. agreement	Lump Sum Settlement	Yes	$100,000 to U.S.

APPENDIX B

APPENDIX B

Historical Summary of Congressional Recognition and Approval of the Executive's Authority to Waive and Settle Claims of United States Nationals Against Foreign States and Nationals

The first Executive Agreement settling a claim of United States citizens against a foreign government and foreign nationals was the settlement of the case of the schooner "Wilmington Packet" in 1799.[1] In 1793 the "Wilmington Packet", owned by a United States national, was stopped by a private armed schooner flying the Netherlands flag and taken, eventually, to the Netherlands island of St. Martin. 5 Miller, *Treaties And Other International Acts Of The United States of America* 1079 (1934) (hereinafter cited as "Miller"). At the prize proceedings, the tribunal declared the cargo as a lawful prize of the claimant, but released the vessel. 5 Miller at 1080. In 1794 the case was

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[1] There were a number of Executive Agreements not involving the settlement of claims prior to 1799. Three of these occurred prior to the adoption of the Constitution, *i.e.*, the declaration by John Adams and Benjamin Franklin on December 20, 1783 stating that cessation of hostilities between the United States and Great Britain would be on terms agreed upon for cessation of hostilities between Great Britain, France and Spain; the agreement between the United States and Morocco of 1786 providing for signals of recognition by vessels at sea; and the exchange of notes with the French government in 1784 declaring that the United States would grant no other nation more favorable commercial terms than granted France. W. McClure, *International Executive Agreements* 35-38 (1941). The last agreement modified Article II of the United States-French Treaty of Amity and Commerce of February 6, 1778 and was entered at the direction of Congress by resolution. *Id.* at 37-38. Authority for the Executive to enter into agreements for the delivery of international mail was approved by the Second and Third Congresses, 1 Stat. 232 (239) (2d Cong.) and 1 Stat. 354 (366) (3rd Cong.) and such agreements were entered into with Canada. McClure at 38-39.

brought to the attention of the Department of State which, through the Minister Resident at The Hague, John Quincy Adams, took up the claim with the Netherlands. Negotiations were continued by Adams' successor William Vans Murray. 5 Miller at 1081-1083, 1085. Murray negotiated an agreement[2] in which the Netherlands paid 20,000 florins, 5 Miller at 1075-1077, 1077-1088 and the United States gave "an acquittance in full of all claims." *Id.* and 5 Miller at 1099.

In the negotiations, Murray did not seek "costs and damages" but rather sought the principal of the value of the goods. 5 Miller at 1095. Even on this value, Murray originally sought 69,674 florins but settled for the 20,000 florins. 5 Miller at 1098.

Both governments were then left to deal with their nationals. The Netherlands was to seek repayment from the privateer who seized the "Wilmington Packet"; and the United States to distribute the fund among the claimants, 5 Miller at 1099, which was not accomplished until 1813. 5 Miller at 1103.

After this first Executive Agreement settling the claims of United States citizens, there followed a series of similar agreements. In 1825, the United States settled four claims arising from the seizure of four schooners between 1817 and 1821 by Venezuelan ships. 3 Miller at 195-199. The settlement provided for a lump sum settlement to the United States which was later distributed by the United States government. 3 Miller at 196-197. On December 6, 1825, President John Quincy Adams, in his annual message to Congress, informed Congress of this settlement. 3 Miller at 197. In the same year, the United States, through Sec-

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[2] In the course of the negotiations, the Netherlands raised a question concerning the true ownership of the "Wilmington Packet." To this Murray replied that this question was "perfectly irrelative. . . ." 5 Miller at 1093.

retary of State Henry Clay, settled the claim of the owners of the Brig "Pearl" against the Russian government for $16,994.69, although the total claim was approximately $75,000. 3 Miller at 201-204, 205. Clay rejected the settlement formula which the claimants expected, *i.e.*, lost profits plus value of cargo, settling for the value of the cargo without interest. 3 Miller at 202. In order to bring the Russian government to terms, John Quincy Adams, then Secretary of State, instructed the United States Minister to advise the Russians that unless the Executive was able to settle the claims on a government-to-government basis expeditiously, the President would subject the dispute to Congress; the implicit threat was that Congress would be much harsher in the matter than the Executive was willing to be.

The 1823 negotiation instruction of John Quincy Adams, then Secretary of State, read, in part:

> Hitherto, this subject has been under the exclusive direction, and control of the Executive. But unless some satisfactory prospect of its adjustment should appear from your communications to this Department, it will cease to be so at the next Session of Congress. I have to request therefore, your early attention to it, and information, as soon as may be, of the result of the steps which you will take concerning it. Should you receive assurances that suitable indemnity will be made, there may be no necessity for submitting the case to the consideration of the Legislature. It will otherwise be indispensable.

3 Miller at 206, *quoting* July 16, 1823 instructions to Richard Rush, Minister to London from John Quincy Adams, Secretary of State.

Again in 1829, the Charge d'Affaires of the United States of America near His Majesty The Emperor of Brazil and

the Brazilian Minister and Secretary of State for Foreign Affairs exchanged notes confirming thirteen claim agreements settling claims for losses and damages suffered by the owners and shippers of thirteen American ships seized and held by a Brazilian squadron. 3 Miller at 485-487. Quite clearly, Secretary of State Henry Clay authorized the Charge d'Affaires to Brazil "to agree, treat, consult and negotiate of and concerning claims of the Citizens and Subjects of the two countries respectively upon the Governments of Brazil and the United States, and all matters and subjects connected therewith." 3 Miller at 489, *quoting* authorization dated November 1, 1827, to William Tudor from Henry Clay. Under that authorization, Tudor negotiated the Treaty of Peace, Friendship, Commerce and Navigation of December 12, 1828, as well as the settlement of the thirteen claims. 3 Miller at 489.

Between 1825 and 1850, there were twenty-four Executive Agreements settling the claims of United States citizens. *See* Appendix A. The Executive negotiated and settled the claims without submitting them to Congress for its ratification. Congress was clearly aware of the practice. For example, the Convention for Adjusting Certain Claims signed by the United States and Colombia on November 25, 1829, settled the claims arising from the cases of the Brig "Josephine" and the Schooner "Ranger". 3 Miller at 523-525. The President, in his message of January 19, 1830, stated:

> I deem the present a suitable occasion to inform you that shortly after my communication to Congress at the opening of session dispatches were received from Mr. Moore, the envoy extraordinary and minister plenipoteniary of the United States to Colombia, stating that he had succeeded in obtaining the assent of the council of ministers to the allowance of the claims of our citizens upon that Government in the

> cases of the brig Josephine and her cargo and the schooner Ranger and her cargo. An official copy of the convention subsequently entered into between Mr. Moore and the secretary of foreign affairs, providing for the final settlement of those claims, has just been received at the Department of State. By an additional article [Article 3] of this convention the claim in the case of the Brig Morris is suspended until further information is obtained by the Colombian Government from the Court of Caracas: and Mr. Moore anticipates its early and satisfactory adjustment. The convention only awaited the ratification of Liberator President, who was at the time absent from Bogota, to be binding upon the Colombian Government. Although these claims are not, comparatively, of a large amount, yet the prompt and equitable manner in which the application of Mr. Moore in behalf of our injured citizens was met by that Government entitles its conduct to our approbation, and promises well for the future relations of the two countries.

3 Miller at 527, *quoting* Presidential Message of January 19, 1830.

Similarly, Congress was well aware of the Executive Agreement between the United States and Portugal, signed January 19, 1832, 3 Miller 653, which settled claims arising from the seizure of four ships, owned by United States citizens, by a Portuguese naval squadron. On January 29, 1831, the House of Representatives by resolution requested that the President inform that body of what measures had been taken with respect to the seizure. 3 Miller 661. President Jackson's response was accompanied by a report of Secretary of State Van Buren which stated in part that ". . . one of the first duties enjoined upon the Charge d'Affaires of the United States, on resuming his diplomatic functions,

was to make a formal demand upon Portugal for indemnity to the owner and crew of the vessel in question." 3 Miller at 662, *quoting* Report of Secretary of State Van Buren of February 15, 1831. Later that year, President Jackson reported to Congress on the negotiations: "Since that period frequent promises have been made that full indemnity shall be given for the injuries inflicted and the losses sustained." 3 Miller 655, *quoting* December 6, 1831, Message to Congress. Indeed when the original schedule for payment was not met and an extension of payment given, Congress was so informed by the President. 3 Miller 667.

In 1845, the United States and Great Britain settled various claims arising from the levy of duty on goods of the other nation. 4 Miller at 779-783. Congress was aware of the disputes by virtue of three presidential messages informing Congress of the disputes, and was aware of the agreements to settle the claims. *See* 4 Miller at 783-787. The Message of President Polk of March 23, 1846, described in detail the "arrangement for the adjustment and payment of the claims of the respective governments upon each other" and asserted "the propriety of making provision to carry this arrangement into effect." Indeed in the Act of May 8, 1846, 9 Stat. 6-9, Congress appropriated funds "in fulfilment [*sic*] of the agreement lately entered into by the government of the United States and Great Britain. . . ."

In addition, Congress was informed of at least the following Executive Agreements: Convention for Adjusting Certain Claims, March 16, 1825, 3 Miller at 197 (President John Quincy Adams' Message to Congress of December 6, 1825); Settlement of Claims, January 19, 1832, 3 Miller at 657 (Presidential Message to Congress of December 4, 1832); Settlement of the Claim for the Ship "Mary" and Her Cargo, March 25, 1839, 4 Miller at 180 (President Van Buren's Message to Congress of December 2, 1839); Agreement for the Settlement of the First Case of the

Brig "Macedonian", July 7, 1840, 4 Miller at 293 (President Tyler's Message to Congress of December, 1843); Agreement for the Settlement of the Case of the Brig "Warrior," 4 Miller at 328 (President Tyler's Message to Congress of December 6, 1842); Convention for the Adjustment of the Claim for the Detention and Seizure of the Schooner "John S. Bryan," June 12, 1843, 4 Miller at 513 (President Tyler's Message to Congress of December, 1843); and Arrangement for the Settlement of the Case of the Brig "Morris," February 26 and 29 and March 1, 1844, 4 Miller at 528 (Presidential Messages to Congress of December 3 and 10, 1844).

During the second half of the nineteenth century and the first decade of the twentieth century, the authority of the Executive to settle claims of United States citizens against foreign governments continued as an established practice and repeatedly was recognized by Congress. A large number of pecuniary claims by United States citizens were settled by Executive Agreements during that period without Senate ratification. *See* Moore, "Treaties and Executive Agreements," 1905 *Political Science Quarterly* 385, and Appendix A. Although Congress was informed of these settlements,[3] a review of congressional materials reveals that it voiced no objection. On a single occasion an attempt was made to pass legislation requiring Senate approval of a particular agreement but the attempt failed to pass. 10 Cong. Rec. 2982 (1880); 13 Cong. Rec. 224 (1881). Congressional recognition of the President's authority in this sphere was further reflected by the fact that appropriations were made by Congress for the organization of the commissions established by the Executive Agreements for the adjudication of the claims of United States nationals against foreign governments. 5 Moore, *International Law Digest* 215 (1906).

[3] 4 Cong. Rec. 175; 6 Cong. Rec. 472.

Events in Congress following the end of World War I highlighted the Congress' recognition that the Executive had full authority to settle claims of United States nationals against a foreign government and/or its nationals. After the War with Germany was formally concluded by means of the 1921 peace treaty, Senator Underwood introduced legislation to amend the Trading With The Enemy Act to establish a claims commission consisting solely of American nationals, and to pay claims out of assets of German nationals seized during the War. S. 3852, 67th Cong., 2d Sess., 62 Cong. Rec. 10441 (1922).[4] While this bill was pending, President Harding, through the Secretary of State, effected an agreement with Germany to determine these very claims. The Executive Agreement differed from that proposed in Senator Underwood's bill by providing for a Mixed Claims Commission of one American and one German arbitrator, and by remaining silent on the source of funds to pay the awards made by the Commission. This Agreement, titled "Agreement for a Mixed Commission to Determine the Amount to be Paid by Germany in Satisfaction of Germany's Financial Obligations Under the Treaty Concluded Between the Two Governments on August 25, 1921" was signed by representatives of the two governments on August 10, 1922, and took effect immediately. 3 Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers* 2601 (1910). No Congressional authority was sought or contemplated in the Agreement, which was self-executing.

Shortly thereafter, the Executive sought funding for the administrative costs of the Commission's work in the

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[4] The peace treaty provided for the possible use of assets confiscated under the Trading With The Enemy Act to pay the claims of Americans against their former enemy, but did not include any mechanism for settling such claims.

Deficiency Appropriations Bill of 1922, H.R. 12704, 67th Cong., 2d Sess., 62 Cong. Rec. 13050 (1922). Senator Underwood mounted a concerted attack on this appropriation, specifically raising before the full Senate the legality of the Executive Agreement. *Id.* at 13050-71. While he was forced to acknowledge that it had been a regular practice for the Executive to settle claims of American nationals against a foreign government without the advice or consent of Congress, Senator Underwood attempted to distinguish the German claims on the grounds that they arose during wartime, involved large numbers of claims amounting to the hundreds of millions of dollars, and were secured by German collateral (*i.e.*, the seized assets of German nationals). *Id.* at 13058. He also asserted that the passage of the Trading With The Enemy Act and his introduction of amending legislation prior to the signing of the Executive Agreement somehow divested the Executive of its authority to settle these claims. *Id.* The Senate soundly defeated Senator Underwood's attempt to amend the Deficiency Appropriations Bill to eliminate funds requested by the President for the Mixed Claims Commission, 62 Cong. Rec. 13071 (1922), and the funds were appropriated.[5] Senator Underwood's conflicting bill died in committee.

The validity of this Executive Agreement was reiterated in hearings held before a Subcommittee of the Senate Judiciary Committee in 1923, when it discussed three bills designed to ensure that confiscated funds would be used to pay those awards made by the Mixed Claims Commission. The subcommittee members reconfirmed their view that the Executive action to settle claims was proper. *Enemy-owned Property: Hearing Before a Subcommittee*

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[5] The Commission went on to settle the claims and awarded American nationals more than $265,939,000.

of the Senate Committee of the Judiciary on S. 3852, S. 559 and S.J. 225, 67th Cong., 4th Sess., Pt. 2 (1923).

Throughout the period between the two World Wars, the Executive continued to settle the claims of American nationals against foreign governments, frequently by Executive Agreement without any congressional involvement. *See* Appendix A. In those instances where congressional comment was made, it was routine, and implicitly or explicitly acknowledged Presidential authority to act independently in this area. Thus on several occasions Congress requested the President or the Secretary of State to inform it of whatever measures have been taken to settle certain claims, providing such information was "not incompatible with the public interest." S. Res. 438, 66th Cong., 3rd Sess., 60 Cong. Rec. 2153 (1921); S. Res. 170, 68th Cong., 2d Sess., 66 Cong. Rec. 5593 (1925); S. Res. 198, 68th Cong., 2d Sess., *id.* at 7243.

In 1929, Congress received a request from President Hoover for an appropriation to cover the expenses of its settlement of the claim of an American citizen, Charles J. Harrah, against the Cuban Government, for the destruction of a railroad he owned in Cuba. S. Doc. 35, 71st Cong., 1st Sess. (1929). Enclosed with the request was a report to the President from the Secretary of State on the procedure followed for negotiating Harrah's claim:

> Following an earnest effort through diplomatic correspondence to obtain payment of an indemnity in behalf of Mr. Harrah, a protocol was signed on October 1, 1929, in which the Government of Cuba agreed with the Government of the United States to submit the claim for adjudication to a commission composed of one American citizen and one Cuban citizen. In the event that the two commissioners are unable to agree on an award, they are to select a third arbitra-

> tor who shall decide the matter. Should the two commissioners be unable to agree upon a third arbitrator, the two Governments are to choose the third arbitrator. The commission is to hold its first meeting on November 29, 1929, at Habana.

Id.

In hearings before the House Committee on Foreign Affairs on appropriating money for the Harrah claim, no question was raised as to the authority of the Executive to enter such an Agreement. The Committee members apprised themselves of the nature of Harrah's claim and agreed that the requested allocation was proper, noting that numerous other claims of Americans had been resolved in precisely the same manner. *Claim of Charles J. Harrah Against the Government of Cuba: Hearings Before the House Committee on Foreign Affairs on H.J. Res. 248,* 71st Cong., 2d Sess. (1930).

In the floor debate on the Harrah appropriation, the only complaint about this procedure was that raised by Representative LaGuardia that the Department of State had not been vigorous enough in its resolution of the claims of certain other American citizens. LaGuardia acknowledged, however, that "it is quite all right to arbitrate claims of citizens, and it is a proper function of the State Department to protect the interests of American citizens whose rights have been infringed upon by foreign governments. . ." 72 Cong. Rec. 7366, 8371, 9161 (1930). Other Congressmen took issue with LaGuardia's opposition, arguing that it merely served to deprive Mr. Harrah of his right to a prompt settlement of his claim by the Secretary of State. *Id.* at 7366-67. LaGuardia withdrew his opposition, and a Joint Resolution was passed authorizing the appropriation. H.J. Res. 245, *id.* at 9177. The claim was settled.

Similarly, when the President requested appropriation to pay costs involved in settling by arbitration the claim of another national, George J. Salem, against the Government of Egypt, the House Committee on Foreign Affairs hearing was confined to presenting the facts of Mr. Salem's claim. *Arbitration of the Claim of George J. Salem Against the Government of Egypt: Hearings Before the House Committee on Foreign Affairs on H.J. Res. 485*, 71st Cong., 3rd Sess. (1931). The only floor debate concerned whether other Americans with claims against foreign nations were equally represented by the State Department, 74 Cong. Rec. 6209 (1931) and whether too much money was requested to cover the cost of this particular arbitration. *Id.* at 7214. This appropriation, too, was ultimately approved.

The legal commentators of the day fully supported the view of the Congress that it was within the Executive's authority to negotiate and settle the claims of American nationals against foreign governments. In the debate on the settlement of German war claims, an article by James F. Barnett entitled "International Agreements Without the Advice and Consent of the Senate," *Yale Law Journal*, November and December, 1905 at 76, was inserted in the Congressional Record. 62 Cong. Rec. 13062. It stated:

> One of the principal duties of the Department of State relates to the protection of American citizens abroad. If the citizen receives an injury to person or property in a foreign country and the local tribunals or other authorities unjustly deny him redress, the department will as a rule present his claim to the Government of the delinquent State. . . . It may happen, however, that the foreign government is unwilling or unable to pay the claim immediately. In that case the representatives of the two governments

> may enter into an agreement setting forth the amount due and the date and terms of payment. This is, of course, a mere written acknowledgement of an existing indebtedness. Such were the agreements of May 1, 1852, with Venezuela (88 Butler, *Treaty Making Power*, II) and May 24, 1897, with Chile (39 Foreign Relations U.S., 1900, p. 68). They were not submitted to the Senate for approval, nor would there be any reason for doing so. It often happens, however, that the foreign government disputes the facts or the law involved in the claim, and recourse may be had to arbitration to effect a settlement. The arbitral undertaking, styled a "protocol of agreement," usually names an arbitrator or provides a method for choosing one or more, as the case may be; stipulates as to matters of procedure, such as the submission of evidence and briefs of counsel; fixes a time limit within which the award is to be made, and provides that the award shall be final and conclusive. In certain cases the amount due, in the event of an award in favor of the claimant, is agreed upon in advance.
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> As was said by Mr. Cass, Secretary of State in 1859: "It is not necessary to submit to the Senate for its formal approval conventions providing for the adjustment of private claims, unless such a course is indicated in the convention itself." (40 Wheaton's Int. Law (Lawrence), p. 456, note 154.). . .

The Congressional Record also contains portions of John B. Moore's article "Treaties and Executive Agreements" in *Political Science Quarterly*, September 1905 at 385, 62 Cong. Rec. 13063-68. He was even more emphatic, noting:

> But, as has heretofore been pointed out pecuniary claims against foreign governments have constantly

> been settled by the President, and no question as to his possession of such a power, apart from discussions as to its possible limitations, appears ever to have been seriously raised. We, therefore, find in the books little that bears upon the subject, but, in at least one case in which a foreign government sought to qualify an agreement made with the President, the validity and finality of his action were vigorously asserted by the Government of the United States.

Moore continued:

> Not only is the power of the President to settle the claims of citizens of the United States against foreign governments firmly established but he has repeatedly employed arbitration for the purpose. An eminent authority has observed that this "at first glance would seem to be an independent exercise of the treaty-making power," but that, "in a strict sense" it "cannot be so regarded;" and it has therefore been placed among "certain acts of an international character, binding the Government, which the President may perform without the interposition of the Senate." (John W. Foster, "The treaty-making power," Yale Law Journal, December, 1901, vol. xi, pp. 77, 79.) The legal theory on which such settlements rest is simple. Arbitration is in such cases only one of the modes by which the President exercises his power to settle claims of individuals against foreign governments. If, in the exercise of this power, differences arise which apparently cannot be directly solved, it is a natural and obvious thing to submit them to the judgment of impartial persons. As early as September 5, 1793, Mr. Jefferson, as Secretary of State, when discussing with the British minister the question of losses sustained by vessels unlawfully captured within American jurisdiction proposed

> as a provisional measure that the collector of customs of the particular district and the British consul "or any other person you please" should "appoint persons to establish the value of the vessel and cargo." (American State Papers, Foreign Relations, vol. i, pp. 174, 175.)

Moore noted that "it would be a work of supererogation to attempt to cite all the cases in which the Executive of the United States has settled individual claims against foreign governments without reference to the Senate . . .," but went on to list many examples from the preceding fifty years.

Congress did not dispute the President's power to settle the claims of United States nationals against the Russian government and Russian nationals following President Roosevelt's recognition of the government of the Union of Soviet Socialist Republics in 1933. That settlement was set forth in an exchange of notes between President Roosevelt and Maxim M. Litvinoff, the U.S.S.R.'s Commissar for Foreign Affairs. *See* 78 Cong. Rec. 465-66 (1934) for the text of the notes. The settlement also resulted in the transfer to the United States of even those assets on which liens had been obtained in the United States' or various states' courts. House Rep. No. 624, 84th Cong., 1st Sess. (1955), reprinted in [1955] U.S. Code Cong. & Ad. News 2745, 2750. In floor debates on the nomination of the first ambassador to the U.S.S.R., opponents as well as supporters of President Roosevelt's action concluded that the act of recognition, together with the accompanying agreements, was not subject to Senate review. 78 Cong. Rec. at 468. Furthermore, the Congress authorized funds to provide for the adjudication by a Commissioner of claims of American nationals against the U.S.S.R. Pub. Res. No. 36, 53 Stat. 1199 (1939); *see* H. Rep. No. 865, *Claims of American*

Nationals Against the Government of the Union of Soviet Socialist Republics, 76th Cong., 1st Sess. (1939).[6]

Since World War II, Congress both has recognized and affirmatively approved of the President's exercise of his Constitutional authority to negotiate settlements of claims of United States nationals against foreign sovereigns and their nationals, and to enter into binding settlements without ratification by the Senate. Indeed, the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621, *et seq.*, as amended (1980), is legislation designed by Congress precisely to implement the distribution of funds received in the course of lump sum settlements entered into exclusively by the Executive with foreign governments. The House of Representatives Report on the legislation when first enacted in 1949 explained:

> This bill [International Claims Settlement Act of 1949] results from an agreement between the Government of the United States and the Government of Yugoslavia, signed at Washington, D.C. on July 19, 1948, in full settlement for American property nationalized or otherwise taken over by Yugoslavia. . . .
>
> The bill would provide a procedure and a mechanism whereby the money received by the United States in pursuance of the agreement can be apportioned among the claimants. The United States, however, is pressing claims of similar nature against other Governments. *As it succeeds in pressing such claims, the money received will be apportioned among the claimants by the same procedure and mechanism. The purpose of the bill thus is not confined to claims against Yugoslavia; it applies to other similar claims as well.*

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[6] In 1955, Congress amended the International Claims Settlement Act of 1949, 22 U.S.C. §§1621, *et seq.*, to provide for the determination by the Foreign Claims Settlement Commission of claims and distribution of funds obtained pursuant to the Litvinoff agreement. Pub. L. 84-285, 69 Stat. 572 (1955).

H. Rep. No. 770, Part 1, 81st Cong., 1st Sess. at 2 (1949) (emphasis supplied). The Yugoslavia settlement was an Executive Agreement not submitted to the Senate for its ratification.

In neither the House nor the Senate Report was the power of the President to enter into such agreements for the settlement of claims disputed. *See also* S. Rep. No. 800, 81st Cong., 1st Sess. (1949). Indeed, Representative Vorys, in setting forth his opposition to the legislation, conceded that the President—not Congress—had the power to enter into settlement agreements, concluding that "[t]here is probably nothing that Congress could do to set aside the settlement made with Yugoslavia." *Minority Views, Settlement Against Foreign Governments*, H. Rep. No. 770, Part 2, 81st Cong., 1st Sess. at 2 (1949).[7]

In the course of the floor debates on the International Claims Settlement Act, Congress' conclusion that the President, rather than Congress, has exclusive authority to settle international claims was restated by both the bill's proponents and opponents. Representative Ribicoff cogently stated Congress' understanding:

> . . . Congress will not approve such future settlements in advance. It will not approve them after the fact. It will not be called upon to approve them at any time. Nor does this bill approve the settlement with Yugoslavia. The simple constitutional point about the matter is that this agreement is the product of an exercise of executive power. It is clearly within the executive power under our Constitution—for it is the executive and not the Congress which has primary power in the

[7] Representative Vorys opposed the legislation because he believed that the Court of Claims, not a new federal agency, should handle the claims, and because he believed that Congress should not encourage claim settlements which do not fully compensate claimants and might encourage future nationalizations at little cost to the offending nation. *Id.* at 2.

> conduct of foreign relations. . . . Such agreements are beyond the constitutional reach of Congress. It could, of course, refuse to set up adequate machinery for making awards to claimants after such claim settlements are entered into. This would have no effect on the scope of the President's authority in this field. It would serve only to deprive certain Americans of their just remedies.

95 Cong. Rec. 8837.

> . . . [Settlement] is a fait accompli. There is nothing this Congress can do about setting aside that claim.

Id. at 8979. The House opponents agreed with Ribicoff's conclusion. *Id.* at 8980 (Rep. Lodge).

The Yugoslavian settlement, 12 Bevans 1277, T.I.A.S. No. 1803 (1948), was the first of a series of at least eleven post-World War II Executive Agreements by which the United States reached agreements for a lump sum amount in full settlement of the claims of its nationals against numerous foreign governments. *See* Appendix A, *supra*. In general, as is the case of the settlement mechanism provided by the Algerian Declarations, *all* claims falling within specified categories of *all* United States nationals were fully settled and discharged. *See, e.g.*, United States-Yugoslavia Settlement, *supra* at Art. 1(a); United States-Rumania Claims Settlement, 1 U.S.T. 317, T.I.A.S. No. 4451 (1960), at Art. 1; United States-Poland Claims Settlement, 11 U.S.T. 1953, T.I.A.S. No. 4545 (1960), at Art. 1; United States-Bulgaria Claims Settlement, 24 U.S.T. 552, T.I.A.S. No. 7569 (1963), at Art. 1; United States-Yugoslavia Claims Settlement (II), 16 U.S.T. 1, T.I.A.S. No. 5750 (1964), Art. 1; United States-Hungary Claims Settlement, 24 U.S.T. 522, T.I.A.S. No. 7569 (1973); United States-Egypt Claims Settlement, 27 U.S.T. 4214, T.I.A.S. No. 8446

(1976), at Art. 1; United States-China Claims Settlement, —— U.S.T. ——, T.I.A.S. 9306 (1979), at Arts. 1-2. In these agreements, release of the foreign government's assets, when held in the United States, was often a provision of a settlement, even though the value of those assets might exceed the lump sum payment, and claimants were not to receive 100% compensation for their claims pursuant to the settlement. *See, e.g.*, Minority Report, H. Rep. 770, Part 2, *supra* at 1. In order to implement these agreements, Congress adopted procedures for the distribution of the lump sum settlement proceeds, thus accepting the President's assertion of power to make the settlements.[8]

In 1963, Senator Keating, concerned about a possible settlement with Czechoslovakia, proposed legislation which would require Senate ratification of any claim agreements made with foreign nations. *See* H.R. 7885, 99 Cong. Rec. 21591 (November 12, 1963). The Senate decidedly rejected the legislation. *Id.* at 21594-5. Senator Fulbright, opposing the legislation, noted:

> I see no reason why the usual procedure should not be followed in this case [regarding a possible Czechoslovakian-United States Settlement]. The custom

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[8] The one exception was in 1974, when Congress effectively blocked the lump sum agreement between the United States and Czechoslovakia. In doing so, however, it did not question the President's authority in any manner. Rather, the settlement called for affording "most-favored-nation" treatment to Czechoslovakia. When the Executive went to Congress seeking such treatment, Congress used the opportunity to scuttle the settlement by providing that "most-favored-nation" treatment would not be provided until Czechoslovakia agreed to a more "equitable" settlement of claims. Trade Act of 1974, Pub. L. No. 93-618, §408, 88 Stat. 2064 (1975). As a result of the Congress' action, Czechoslovakia withdrew from the settlement, as the agreement permitted. Lillich, "The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement," 69 *Am. J.I.L.* 837 (1975).

> clearly is to submit such claims to the Foreign Claims Settlement Commission, as provided by law; and we are always given a report in regard to the settlement. But under this Act, such matters have not been handled by treaty. The one exception of which I know involved a case in Panama, but our relations with Panama are on a different basis from our relations with many other countries.
>
> I see no reason whatsoever to depart from the custom, and in this case to require a treaty. . . .

Id. at 21593.

In 1972, Congress again entertained legislation relating to congressional oversight of executive agreements. It took limited action, passing legislation requiring only that the text of significant executive agreements be transmitted to Congress. 1 U.S.C. §112b, Pub.L. 92-403, 86 Stat. 619 (1972) [the "Case Act"]. Senator Case, the author of the Act, noted that its provisions were not prompted by concern over the President's exercise of his traditional power to settle international claims. In a colloquy with John R. Stevenson, the State Department Legal Advisor, Senator Case recognized the long history of the Executive's exercise of power to settle international claims and Congress' acceptance of such power, and expressed his lack of troubling concern:

> Mr. STEVENSON. . . . I am talking about the international claims agreements. This has been something that traditionally the Executive has been considered to have a right as our spokesman and our representative internationally to settle. . . .
>
> Senator CASE. Well, it is a most interesting area and one in which my practice has never led me. *But I*

think it is a most interesting one in which we have accepted the right of the President, one individual, acting through his diplomatic force, to adjudicate and settle claims of American nationals against foreign countries. But that is a fact.

Mr. STEVENSON. That is a fact.

Senator CASE. *That is all right and it doesn't trouble me too much. If we wanted to get into it, I suppose we could do something about it. God knows, I don't think we do.*

• • •

Senator CASE. I remember some claims involving German claims and others. *But I am not really concerned about that matter.*

Hearings before Committee on Foreign Relations, U.S. Senate, Transmittal of Executive Agreements to Congress, 92nd Cong., 1st Sess. 74 (1971) (emphasis supplied).

Although other legislation was proposed and extensive hearings held regarding the President's power to enter into executive agreements, only the Case Act became law. The rejected legislation typically would have required congressional approval of executive agreements before they could be considered effective. These sponsors were prompted by unease with secret and/or far-reaching executive agreements which made major commitments of the United States to other countries, such as commitments of troops, pledges of military actions, and provisions of equipment. *See, in general, Hearings, Congressional Oversight of Executive Agreements—1975,* Subcommittee on Separation of Powers of Committee on the Judiciary, U.S. Sen., 94th Cong., 1st Sess. (1975). Settlement of international claims by the President, without Congressional oversight, expressly was not a concern. As Senator Glenn, the author of S.1251,

himself noted, Congress was not concerned with traditional executive agreements which "were innocuous agreements[,] they were not a major thing, they were working out claims against a foreign government. . . ." *Hearings on Congressional Oversight of Executive Agreements—1975, supra* at 48.

Congress has adhered to the claims settlement process exemplified by the International Claims Settlement Act since the passage of the Foreign Sovereign Immunities Act of 1976. In late 1980, Congress enacted amendments to the International Claims Settlement Act to provide for determination by the Foreign Claims Settlement Commission (FCSC) of outstanding claims of United States nationals against Vietnam. Pub.L. 96-606, 94 Stat. 3534 (Dec. 28, 1980). The House Report stated the purpose of the legislation:

> The purpose of H.R. 5737 is to establish an official inventory of losses of private U.S. property in Vietnam which will have as the basis for eventual efforts by the United States Government to recover those losses from the Government of Vietnam on behalf of U.S. claimants. Recovery is intended to be achieved through direct Government-to-Government negotiation of private property claims.

Committee on Foreign Affairs, U.S. House, H. Rep. No. 96-915, *United States Nationals—Recovery of Losses*, 96th Cong., 2d Sess. at 2 (1980). As the Report notes, previous claims had been negotiated with, *inter alia*, Yugoslavia, Poland, Bulgaria, Hungary, Rumania and China, with recoveries ranging from 10 to 100 percent. *Id.* In each, the settlements were made, "Government-to-Government," that is, by Executive Agreement. Indeed, the Committee on Foreign Affairs particularly remarked upon the "latest suc-

cessful negotiation . . . with the People's Republic of China," which was entered into force by Executive Agreement. *Id.*[9]

It is clear that Congress continues to view the underlying premise of the International Claims Settlement Act of 1949—that the President will negotiate and conclude settlements with foreign governments covering claims of United States nationals—as operative and, in fact, desirable. The settlement with the People's Republic of China, *supra*, evoked no Congressional questioning of presidential power to conclude a settlement.[10]

Following the United States' and Iran's adherence to the Algerian Declarations, which provide for the settlement through an international arbitration tribunal of claims of the United States nationals against Iran and its nationals, both the House and Senate held hearings on the settlement. No legislation has been reported out of the committees before which the hearings were held, which would disapprove the President's exercise of his claims settlement powers.

The hearings before the Senate Committee on Foreign Relations were held after the Committee Chairman reported to the Committee that the Reagan Administration intended to implement the settlement. The Committee, despite the dissatisfaction of some members with the

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[9] *See also Hearings before Subcommittee on Asian and Pacific Affairs and on International Economic Policy and Trade of Committee on Foreign Affairs*, U.S. House, 96th Cong., 1st Sess. (1979), during which Representatives and witnesses commented upon prior successful claims settlements, *id.* at 1, and the desire of the United States "to conclude [with Vietnam] a lump sum claims settlement agreement or other agreement at the appropriate time," *id.* at 18; *see also id.* at 13.

[10] Congress held hearings on the distribution of the proceeds of the China settlement, but did not question the fact of the settlement agreement nor the President's power to conclude it. *See Hearings before Committee on Foreign Relations, U.S. Senate, China Claims,* 96th Cong., 2d Sess. (1980).

terms of the settlement, proceeded with the hearing accepting the premise that the settlement was a *fait accompli* within the President's power. As Senator Lugar said:

> Our Chairman has briefed us at the outset of the hearing and reiterated the thought that he has visited this very day with the President, or with Administration people, who have indicated this Administration is going to proceed with the agreement.
>
> So, in essence, this inquiry is important for the record, *but it appears in terms of effective action, that the agreement has happened and is going to proceed.*

To Hear Testimony on the United States Iranian Agreements: Hearings Before the Senate Committee on Foreign Relations, 97 Cong., 1st Sess. (February 17, 1981) (official transcript at 62-63).* (emphasis supplied)

Despite specific requests by some claimants against Iran who said they were aggrieved by the settlements, Congress and the committees did not report out remedial legislation or question the Executive's authority. In the hearing before the Senate Committee on Banking, Housing and Urban Affairs, one witness recommended that Congress either informally or formally through a congressional resolution "make it clear that neither pre-Freeze attachments nor property subject thereto will be affected in any way and that no court judgments will be nullified. More broadly, the Executive Branch should take action to insure that no American claimant is involuntarily deprived of a United States court forum for its claims against Iran. . . ." *Iranian Assets Settlement: Hearing Before the Senate Committee on Banking, Housing and Urban Affairs*, 97th

* The official transcript is available for inspection at the offices of the Committee.

Cong., 1st Sess. 160 (February 19, 1981) (statement of Thomas W. Luce, III). The witness also suggested legislation or a declaration by concurrent resolution ending the national emergency and the President's authority to act, citing 50 U.S.C. §1706. *Id.* The Committee has not accepted the suggestions.

Similarly, in hearings before the Senate Foreign Affairs Committee, claimants suggested modifications in the implementation of the Declarations, such as not transferring attached funds until it is clear whether Iran will replenish the $1 billion escrow account. *Hearings Before Senate Committee on Foreign Relations, supra* (February 18, 1981) (official transcript at 5-11, 18). No legislation nor a resolution to that effect have been enacted.* So, too, after hearings, the House has not recommended any remedial or clarifying legislation. Hearings on the Algerian Declarations Before the House Foreign Affaris Committee, 97th Cong., 1st Sess. (February 19, 1981) (unpublished). Thus, while Congress may have some doubts as to the wisdom of the settlement, it has acquiesced, if not concurred, in the exercise of Executive power to enter into the Algerian Declarations.

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* A resolution, H. Con. Res. 48, introduced January 30, 1981, 127 Cong. Rec. H279 (Daily ed., no. 17, Jan. 30, 1981), providing that no further steps implementing the Algerian Declaration be taken absent congressional approval, has not been reported out of the Committee, much less enacted.

APPENDIX C

APPENDIX C

Executive Order 12,170 of November 14, 1979, 44 Fed. Reg. 65,729

Blocking Iranian Government Property

Pursuant to the authority vested in me as President by the Constitution and laws of the United States including the International Emergency Economic Powers Act, 50 U.S.C.A. sec. 1701 *et seq.*, the National Emergencies Act, 50 U.S.C. sec. 1601 *et seq.*, and 3 U.S.C. sec. 301.

I, JIMMY CARTER, President of the United States, find that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and hereby declare a national emergency to deal with that threat.

I hereby order blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.

The Secretary of the Treasury is authorized to employ all powers granted to me by the International Emergency Economic Powers Act to carry out the provisions of this order.

This order is effective immediately and shall be transmitted to the congress and published in the Federal Register.

THE WHITE HOUSE,
November 14, 1979.

Regulations

Iranian Assets Control Regulations, 31 C.F.R. Part 535, 31 C.F.R.:

§ 535.201 Transactions involving property in which Iran or Iranian entities have an interest.

No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after the effective date Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized.

§ 535.203 Effect of transfers violating the provisions of this part.

(e) Unless licensed or authorized pursuant to this part any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since the effective date there existed an interest of Iran.

§ 535.418 Authorization of judicial proceedings under § 535.504.

The general authorization for judicial proceedings contained in § 535.504(a) includes pre-judgment attachment. However, § 535.504(a) does not authorize payment of delivery of any blocked property to any court, marshal, sheriff, or similar entity, and any such transfer of blocked property is prohibited without a specific license. It would not be consistent with licensing policy to issue such a license.

§ 535.504 Certain judicial proceedings with respect to property of Iran or Iranian entities.

(a) Subject to the limitations of paragraphs (b) and (c) of this section, judicial proceedings are authorized with respect to property in which on or since the effective date there has existed an interest of Iran or an Iranian entity.

(b) This section does not authorize or license:

(1) The entry of any judgment or of any decree or order of similar or analogous effect upon any judgment book, minute book, journal or otherwise, or the docketing of any judgment in any docket book, or the filing of any judgment roll or the taking of any other similar or analogous action.

(2) Any payment or delivery out of a blocked account based upon a judicial proceeding, nor does it authorize the enforcement or carrying out of any judgment or decree or order of similar or analogous effect with regard to any property in which Iran or an Iranian entity has an interest.

(c) A judicial proceeding is not authorized by this section if it is based on transactions which violated the prohibitions of this part.

(d) Property transferred into or held in the United States by Iran or an Iranian entity under a specific license which by its terms withdraws the authorization for prejudgment attachment with respect to such property is excluded from the privileges of paragraph (a) of this section.

§ 535.805 Amendment, modification, or revocation.

The provisions of this part and any rulings, licenses, authorizations, instructions, orders, or forms issued thereunder may be amended, modified, or revoked at any time.

No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

DAMES & MOORE, a partnership,
Petitioner,

v.

DONALD T. REGAN, the Secretary
of the Treasury of the United States
of America, and THE UNITED STATES OF AMERICA,
Respondents,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE ATOMIC ENERGY ORGANIZATION OF
THE ISLAMIC REPUBLIC OF IRAN,
and
BANK MARKAZI IRAN,
Intervenor-Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit Before Judgment

BRIEF FOR INTERVENOR-RESPONDENT THE ISLAMIC REPUBLIC OF IRAN

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QUESTIONS PRESENTED FOR REVIEW

The issues presented for review and addressed herein by intervenor-respondent the Islamic Republic of Iran are:

1. Whether the Algerian Declarations, and the obligations imposed on the United States by the Declarations, bind United States courts as a matter of international and domestic law;

2. Whether the Executive actions ordering the transfer of Iranian assets, as required by the Algerian Declarations, are a valid exercise of the President's authority under the Constitution and the International Emergency Economic Powers Act;

3. Whether the Algerian Declarations validly settled claims of United States nationals consistent with the jurisdictional grant of the Foreign Sovereign Immunities Act;

4. Whether the revocation of a revocable license to attach foreign assets constitutes an unconstitutional taking of property of United States litigants without just compensation and whether this Court should now decide whether the settlement of claims of United States litigants, effected by the Algerian Declarations, constitutes an unconstitutional taking of their property without just compensation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
EXECUTIVE ORDERS AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	12
ARGUMENT	13
I. THE ALGERIAN DECLARATIONS BIND THE UNITED STATES AS A MATTER OF INTERNATIONAL AND DOMESTIC LAW, AND THE COURT SHOULD NOT PLACE THE UNITED STATES IN BREACH OF ITS OBLIGATIONS BY DECLINING TO UPHOLD EXECUTIVE ACTIONS INTENDED TO DISCHARGE THOSE OBLIGATIONS	13
II. THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT PERMITS THE PRESIDENT TO BLOCK, REGULATE, AND COMPEL TRANSFERS OF FOREIGN ASSETS DURING A NATIONAL EMERGENCY	17
A. The President Possesses Express Statutory Authority To Regulate and Compel the Transfer of Foreign Assets	17
B. The Legislative History of the IEEPA Indicates No Intent to Limit Beyond the Plain Meaning of the Statute Executive Authority To Transfer Assets	20
C. Congress Has Acquiesced in the President's Exercise of Authority To Nullify Attachments and Compel the Transfer of Iranian Assets	22

Page

D. This Court and the Lower Courts in the Iranian Assets Litigation Have Upheld the Executive's Statutory Powers To Regulate Transfers of Foreign Assets 24

E. The Foreign Sovereign Immunities Act Does Not Supercede the President's Authority under the IEEPA To Return Iranian Property 29

III. PETITIONER'S CLAIM HAS BEEN VALIDLY SETTLED BY THE ALGERIAN DECLARATIONS, AND THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT IMPAIR THE VALIDITY OF THIS SETTLEMENT 33

A. The Executive Has Authority To Settle Petitioner's Claims by the Algerian Declarations 33

B. The Foreign Sovereign Immunities Act Does Not Interfere with the Executive's Authority To Settle Claims 37

IV. NO TAKING COGNIZABLE BY THIS COURT HAS OCCURRED 41

A. Nullification of Petitioner's Prejudgment Attachment Was Not a Taking Under the Fifth Amendment 41

B. The Issue Whether Any Obligation Can Be Imposed on the United States To Compensate Petitioner for the Settlement of Claims Under the Algerian Declarations Is Not Ripe for Review 44

CONCLUSION 50

TABLE OF AUTHORITIES

	Page
CASES:	
Administrator, Federal Aviation Admin. v. Robertson, 422 U.S. 255 (1975)	32
American Bell Int'l Inc. v. Islamic Republic of Iran, Civ. Act. No. 80-0321 (D.D.C. June 11, 1981), *appeal docketed,* No. 81-1656 (D.C. Cir. June 11, 1981) *petition for cert. filed* (U.S. June 15, 1981) (No. 80-2111)	27,28,40
American Int'l Group Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir. May 22, 1981)	*passim*
Avramova v. United States, 354 F. Supp. 420 (S.D.N.Y. 1973)	35
B. Altman & Co. v. United States, 224 U.S. 583 (1912)	15
Baker v. Carr, 369 U.S. 186 (1962)	26
Behring Int'l v. Imperial Iranian Air Force, 475 F. Supp. 383 (D. N.J. 1979)	
Blount Brothers Corp. v. Government of Iran, No. CV 79-1442V (W.D. Wash. May 11, 1981), *appeal pending,* No. 81-3256 (9th Cir.)	27
Blount Brothers Corp. v. Government of Iran, No. 81-3256 (9th Cir. June 1, 1981), *as amended* (June 9, 1981)	27,40
Chas. T. Main Int'l Inc. v. Khuzestan Water & Power Auth., No. 80-1027 (1st Cir. May 22, 1981)	*passim*
Chas. T. Main Int'l Inc. v. United States, Civ. No. 80-315-C (D. Mass. Mar. 17, 1981), *aff'd,* No. 81-1176 (1st Cir. May 22, 1981)	27,40
Chevron Chem. Co. v. Costle, 499 F. Supp. 732 (D. Del. 1980), *aff'd,* 641 F.2d 104 (3d Cir. 1981)	49
Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103 (1948)	28
County-Wide Insurance Co. v. Harnett, 426 F. Supp. 1030 (S.D.N.Y.), *aff'd mem.,* 431 U.S. 934 (1977)	48
Dames & Moore v. Atomic Energy Organization of Iran, No. CV 79-4918 LEW (C.D. Cal., filed Dec. 19, 1979)	3,10

	Page
Dames & Moore v. Atomic Energy Organization of Iran, No. 81-2-00290-4 (Wash. Super. Ct., filed Feb. 19, 1981)	7,9
Dames & Moore v. Atomic Energy Organization of Iran, No. 81-2-00665-3 (Wash. Super. Ct., filed Feb. 19, 1981)	7,9
Dames & Moore v. Atomic Energy Organization of Iran, No. 81-2-03449-7 (Wash. Super. Ct., filed Mar. 5, 1981)	9
Dames & Moore v. Donald T. Regan, No. CV 81-2064 LEW (C.D. Cal., filed April 27, 1981)	9-10,28
Daniel, Mann, Johnson & Mendenhall v. Donald T. Regan, No. CV 81-1101 LEW (C.D. Cal., filed May 5, 1981)	10,28
Dole v. Carter, 444 F. Supp. 1065 (D. Kan. 1977)	15,44
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)	49
Electronic Data Systems Corp. Iran v. Social Security Organization of the Government of Iran, No. CA-3-79-218-F (N.D. Tex. June 7, 1981)	28,40
E-Systems, Inc. v. Islamic Republic of Iran, 491 F. Supp. 1294 (N.D. Tex. 1980)	29
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)	33
Goldberg v. Kelly, 397 U.S. 254 (1970)	48
Guerra v. Guajardo, 466 F. Supp. 1046 (S.D. Tex. 1978)	16
Harisiades v. Shaughnessy, 342 U.S. 580 (1952)	26
Hirabayashi v. United States, 320 U.S. 81 (1943)	28
Hodel v. Indiana, No. 80-231, (U.S. June 15, 1981)	47
Hodel v. Virginia Surface Mining & Recl. Ass'n, No. 79-1538 (U.S. June 15, 1981)	46,47
K.S.B. Technical Sales Corp. v. New Jersey Dist. Water Supply Comm'n, 381 A.2d 774 (N.J. 1977), *appeal dismissed*, 435 U.S. 982 (1978)	16
Lauritzen v. Larsen, 345 U.S. 571 (1953)	15,16
Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081 (6th Cir. 1978)	49
Mackenzie v. Hare, 239 U.S. 299 (1915)	28

	Page
Marschalk Co. v. Iran Nat'l Airlines Corp., No. 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981)	25,27,40, 43,47
Mashayekhi v. Iran, Civ. Act. No. 79-2039 (D.D.C. June 11, 1981)	45
Mathews v. Diaz, 426 U.S. 67 (1976)	22
Morrissey v. Brewer, 408 U.S. 471 (1972)	48
Morton v. Mancari, 417 U.S. 535 (1974)	32-33
Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)	15,33
New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., 502 F. Supp. 120 (S.D.N.Y. 1980), *remanded on other grounds*, No. 80-6254 (2d Cir. Apr. 9, 1981)	29
Nielsen v. Secretary of Treasury, 424 F.2d 833 (D.C. Cir. 1970)	35,45
Nuclear Tests Case (Australia v. France), [1974] I.C.J. Rep. 253, 57 I.L.R. 398	14
Orvis v. Brownell, 345 U.S. 183 (1953)	21,25
Ozanic v. United States, 188 F.2d 228 (2d Cir. 1951).	35
The Paquete Habana, 175 U.S. 677 (1900)	15
Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)	49
Propper v. Clark, 337 U.S. 472 (1949)	21,33
Reading & Bates Corp. v. National Iranian Oil Co., 478 F. Supp. 724 (S.D.N.Y. 1979)	29
Regional Rail Reorganization Act Cases, 419 U.S. Reorganization Act 102 (1974)	48,49
Richardson v. Simon, 560 F.2d 500 (2d Cir. 1977), *appeal dismissed sub nom. Richardson v. Blumenthal*, 435 U.S. 939 (1978)	21,22,24
Rossi v. Brown, 23 F.E.P. Cas. 1694 (D.C. Cir. Sept. 15, 1980)	14
S.A. Enterprises Jan de Nul v. Brown & Root Int'l, Ltd., No. H-80-131 (S.D. Tex. May 18, 1981)	28
Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir. 1966)	21

	Page
Security Pacific Nat'l Bank v. Government and State of Iran, No. CV 79-4661 RJK (C.D. Cal. Apr. 30, 1981), *appeal pending sub nom. Hoffman Export Corp. v. Government of Iran*, No. 81-5432 (9th Cir.)	27,29, 40,46
Sociedad Nacional de Marineros de Honduras v. McCulloch, 201 F. Supp. 82 (D.D.C. 1962), *aff'd*, 372 U.S. 10 (1963)	15
Sperry Corp. v. Government of Iran, No. 80-2766 (D.D.C. June 11, 1981)	28
Stringer v. United States, 471 F.2d 381 (5th Cir. 1973), *cert. denied*, 412 U.S. 943 (1973)	49
United States v. Belmont, 301 U.S. 324 (1937)	15-6,
United States v. Chemical Foundation, 272 U.S. 1 (1926)	28-29,
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)	15,26, 28,38
United States v. Pink, 315 U.S. 203 (1942)	15-6, 21, 35
United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 102 (1801)	36-37
United States v. Yoshida Int'l, Inc., 526 F.2d 560 (C.C.P.A. 1975)	31,32,33
Union Carbide Agricultural Prods. Co. v. Costle, 632 F.2d 1014 (2d Cir. 1980)	45
Unidyne Corp. v. Government of Iran, Civ. Act. No. 80-1029-A (E.D. Va. Mar. 30, 1981)	27
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	16,28,38
Zittman v. McGrath, 341 U.S. 446 (1951)	21,25,26
CONSTITUTIONAL PROVISIONS:	
U.S. Const., art. II, §2, cl. 2	15
U.S. Const., art. VI	31
STATUTES, EXECUTIVE ORDERS & REGULATIONS:	
1 U.S.C. §112b (Supp. III 1979)	16,23

	Page
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1391(f), 1441(d), 1602-11 (Supp. III 1979)	*passim*
§1604	31
§1609	29,31,41
§1610(a)	41
§1610(d)	29
International Emergency Economic Powers Act, 50 U.S.C. §§1701-1706 (Supp. III 1979)	*passim*
§1701(a)(1)	17
§1702	20,30
§1702(a)(1)(B)	18,19
§1702(a)(1)(B)	
§1703	23
§1703(d)	23
National Emergencies Act, 50 U.S.C. §§1622(b), 1631, 1641 (Supp. III 1979)	23
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§1201-1328 (Supp. III 1979)	46-47
Trading with The Enemy Act, 50 U.S. C. App. §§1-44 (1976 & Supp. III 1979)	*passim*
§5(b)	17,20,21 22,25
Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979).	2,19
Exec. Order No. 12,276, 46 Fed. Reg. 7,913 (1981)	2,5
Exec. Order No. 12,277, 46 Fed. Reg. 7,915 (1981)	5,6,42
§1-102(a)	5
§1-102(b)	6,42
§1-102(c)	5,42
Exec. Order No. 12,278, 46 Fed. Reg. 7,917 (1981), *as corrected,* 46 Fed. Reg. 10,895 (1981)	5,6,42
§1-104(a)	5
§1-104(b)	6,42
§1-104(c)	5,42

	Page
Exec. Order No. 12,279, 46 Fed. Reg. 7,919 (1981), *as corrected,* 46 Fed. Reg. 10,897 (1981)	5,6,42
§1-102(a)	5
§1-102(b)	6,42
§1-102(c)	5,42
Exec. Order No. 12,280, 46 Fed. Reg. 7,921 (1981)	5,6,42
§1-102(a)	6
§1-102(b)	6,42
§1-102(c)	6,42
Exec. Order No. 12,281, 46 Fed. Reg. 7,923 (1981)	5,6,42
§1-102(a)	6
§1-102(b)	6,42
§1-102(c)	6,42
Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).	7,34
Foreign Assets Control Regulations	
31 C.F.R. §500.201 (1980)	30
31 C.F.R. §500.310 (1980)	30
Cuban Assets Control Regulations	
31 C.F.R. §515.201 (1980)	21,30
31 C.F.R. §515.310 (1980)	21,30
31 C.F.R. §515.504 (1963)	21
Iranian Assets Control Regulations	
31 C.F.R. §§535.101-535.904 (1980)	2,3
§535.201	17,25,44
§535.201(a)	41
§535.203(e)	3,7,17, 25,34,41, 44
§535.301(a)(1)	3
§535.310	3,17,18, 25,41,44
§535.418	8,17,25, 42,44

	Page
§535.504	44
§535.504(a)	3,42
§535.504(b)(1)	7,8,34
§535.504(b)(1)(2)	8
§535.504(b)(2)	3,17
§535.701	11
§535.805	3,25
44 Fed. Reg. 65,956 (1979) (to be codified in 31 C.F.R. §535.201)	2
44 Fed. Reg. 65,956 (1979) (to be codified in 31 C.F.R. §535.201(a))	2,3,9
44 Fed. Reg. 65,957 (1979) (to be codified in 31 C.F.R. §535.210(a))	2,41,44
46 Fed. Reg. 14,330-14,377 (1981)	8
46 Fed. Reg. 14,330 (1981)	8
46 Fed. Reg. 14,334 (1981) (to be codified in 31 C.F.R. §535.213(a), 535.214(a))	2,8
46 Fed. Reg. 14,334 (1981) (to be codified in 31 C.F.R. §535.215)	2,8
46 Fed. Reg. 14,334 (1981) (to be codified in 31 C.F.R. §535.218)	8,42
46 Fed. Reg. 14,335 (1981) (to be codified in 31 C.F.R. §535.221(b))	2,8,11, 39
46 Fed. Reg. 14,335 (1981) (to be codified in 31 C.F.R. §535.222)	34
46 Fed. Reg. 14,335 (1981) (to be codified in 31 C.F.R. §535.222(a))	8
46 Fed. Reg. 14,336 (1981) (to be codified in 31 C.F.R. §535.504(b)(1))	8,42
46 Fed. Reg. 14,337 (1981)	2,8
46 Fed. Reg. 30,340 (1981)	2,11
46 Fed. Reg. 30,341 (1981) (to be codified in 31 C.F.R. §§535.213(b), 535.214(b))	11
46 Fed. Reg. 30,341 (1981) (to be codified in 31 C.F.R. §535.221)	11

	Page
46 Fed. Reg. 31,630 (1981) (to be codified in 31 C.F.R. §§535.213(e), 535.214(e))	11
46 Fed. Reg. 31,630 (1981) (to be codified in 31 C.F.R. §535.215(c))	11
EXECUTIVE & INTERNATIONAL AGREEMENTS:	
Declaration of the Government of the Democratic and Popular Republic of Algeria (Jan. 19, 1981)	*passim*
General Principle A	4,14,45
General Principle B	4,13,33, 34,41
¶4	4,5,14
¶5	4,5,14
¶6	4,5,14, 34
¶7	4,5,14, 45
¶8	4,5,14
¶9	4,5,14
¶17	14,15,35
Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Jan. 19, 1981)	*passim*
Article II	34
Article II, ¶3	15
Article III, ¶4	34
Article IV, ¶1	34
Article IV, ¶3	15,34,35, 45
Article VI, ¶4	7,35
Article VII	34
Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. 3853 (entered into force June 16, 1957)	13,29,45

	Page
LEGISLATIVE MATERIALS:	
H.R. Rep. No. 1487, 94th Cong., 2d Sess. *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604	31
H.R. Rep. No. 1301, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 3067	16
H.R. Rep. No. 459, 95th Cong., 1st Sess. (1977)	20,21, 22-23,30
S. Rep. No. 466, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Ad. News 4540	23,30,39
Sen. Comm. on Government Operations, National Emergencies Act, S. Rep. No. 1168, 94th Cong., 2d Sess. (1975)	21
Hearings on the Iranian Assets Settlement Before the Senate Comm. on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. (Feb. 19, 1981) (unpublished)	39
Hearings on the Iranian Agreements Before the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess. (Feb. 17-18, 1981) (unpublished)	24,39
Hearings on the Algerian Declarations Before the House Comm. on Foreign Affairs, 97th Cong., 1st Sess. (Feb. 19, 1981) (unpublished)	24
Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. (1973)	31
Hearings on Emergency Controls on Int'l Economic Transactions Before the Subcomm. on Int'l Economic Policy and Trade of the House Comm. on Int'l Relations, 95th Cong., 1st Sess. (1977)	30
79 Cong. Rec. 969 (1935) (listing 40 executive agreements, entered into between 1842 and 1931, providing for arbitration of claims against foreign governments)	16
President's Message to Congress on the United States-Iran Agreement on Release of the American Hostages, 17 Weekly Comp. of Pres. Doc. 3041 (Jan. 19, 1981)	24
President's Message to Congress on the Suspension of Litigation Against Iran, 17 Weekly Comp. of Pres. Doc. 189 (Feb. 24, 1981)	24

Page

SCHOLARLY COMMENTARY:

S. Crandall, *Treaties: Their Making and Enforcement* (2d ed. 1916) 36

L. Henkin, *Foreign Affairs and the Constitution* (1972) 38

W. McClure, *International Executive Agreements* (1941) 15

Q. Wright, *The Control of American Foreign Relations* (1922) 38

Restatement (Second) of Foreign Relations Law of the United States (1965)

§3, Comment c 15

§3, Comment g 15

§115, Comment a, Illustration 2 14

§138 14

§140 14

Memorandum by American Law Div'n, Congressional Research Serv., Library of Congress, *Definition of the Phrase International Agreement* (Mar. 17, 1978) 14

MISCELLANEOUS:

Fed. R. Civ. P. 12(b)(6) 10

Fed. R. Civ. P. 62(c) 11

Brief for the United States as *Amicus Curiae, Electronic Data Systems Corp. Iran v. Social Security Organization of the Government of Iran*, 610 F.2d 94 (2d Cir. 1979) 30

No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

DAMES & MOORE, a partnership,
Petitioner,

v.

DONALD T. REGAN, the Secretary
of the Treasury of the United States
of America, and THE UNITED STATES OF AMERICA,
Respondents,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE ATOMIC ENERGY ORGANIZATION OF
THE ISLAMIC REPUBLIC OF IRAN,
and
BANK MARKAZI IRAN,
Intervenor-Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit Before Judgment

BRIEF FOR INTERVENOR-RESPONDENT THE ISLAMIC REPUBLIC OF IRAN

Intervenor-respondent the Islamic Republic of Iran (the "Government of Iran"), by counsel, herewith submits its brief on writ of *certiorari.*

EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The following supplements the Executive Orders and regulations cited by petitioner (Pet. at 2-3): Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979); Exec. Order No. 12,276, 46 Fed. Reg. 7,913 (1981); 31 C.F.R. §§535.101-535.904 (1980); 44 Fed. Reg. 65,956 (1979) (to be codified in 31 C.F.R. §535.201); 46 Fed. Reg. 14,334 (1981), *as amended,* 46 Fed. Reg. 26,477 (1981), 46 Fed. Reg. 30,341 (1981), 46 Fed. Reg. 31,630 (1981) (to be codified in 31 C.F.R. §535.213); 46 Fed. Reg. 14,334 (1981), *as amended,* 46 Fed. Reg. 26,477 (1981), 46 Fed. Reg. 30,341 (1981), 46 Fed. Reg. 31,630 (1981) (to be codified in 31 C.F.R. §535.214); 46 Fed. Reg. 14,334 (1981), *as amended,* 46 Fed. Reg. 26,477 (1981); 46 Fed. Reg. 31,630 (1981) (to be codified in 31 C.F.R. §535.215); 46 Fed. Reg. 14,335 (1981) (to be codified in 31 C.F.R. §535.221); 46 Fed. Reg. 30,341 (1981) (to be codified in 31 C.F.R. §535.221); 46 Fed. Reg. 30,340 (1981); 46 Fed. Reg. 14,337 (1981).

These authorities are set forth in a separate Appendix of intervenor-respondent the Islamic Republic of Iran ("Iran App.").

The complete text of the 1980 Iranian Assets Control Regulations is also set forth for the Court's convenience and ease of reference, although several of these regulations have been quoted by petitioner in its appendix.

STATEMENT OF THE CASE

On November 14, 1979, former President Carter issued Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979) (Iran App. 1a), blocking all property and interests in property of the Government of Iran, its instrumentalities, and controlled entities within the jurisdiction of the United States or within the possession or control of persons subject to the jurisdiction of the United States. The Department of the Treasury concurrently issued regulations implementing the Executive Order. *See*

generally 31 C.F.R. §§535.101-535.904 (1980) (commonly referred to as the "Iranian Assets Control Regulations") (Iran App. 5a). The regulations, *inter alia,* prohibited attachments, garnishments, judgments, liens, executions, and all other judicial process with respect to property in which Iran[1] had an interest on or after November 14, 1979. 31 C.F.R. §535.203(e) (Iran App. 11a); *see* 44 Fed. Reg. 65,956 (to be codified in 31 C.F.R. §535.201(a)) (Iran App. 50a); 31 C.F.R. §535.310 (Iran App. 16a). The Treasury Department issued a further regulation, 31 C.F.R. §535.805 (Iran App. 48a), on November 19, 1979, specifically providing that all regulations and licenses issued pursuant to the Iranian Assets Control Regulations could be revoked at any time.

Thereafter, on November 23 and December 18, 1979, the Treasury Department amended its regulations by issuing a general license that authorized certain judicial proceedings, including prejudgment attachments, with respect to Iranian property. 31 C.F.R.§§535.418, 535.504(a) (Iran App. 23a, 29a). Judgments and executions thereon were among the judicial proceedings which remained prohibited, as was the creation of liens. 31 C.F.R. §§535.203(e), 535.504(b)(2) (Iran App. 11a, 29a).

On December 19, 1979, petitioner commenced an action in the United States District Court for the Central District of California against the Government of Iran, the Atomic Energy Organization of the Islamic Republic of Iran ("AEOI"), and 27 Iranian banks. *Dames & Moore* v. *Atomic Energy Organization of Iran,* No. CV 79-4918 LEW (C.D. Cal.). Petitioner alleged that it was the owner of a Venezuelan company, Dames & Moore, S.R.L. ("Dames"), which had entered into a contract with AEOI to perform certain site validation studies and other services in connection with the construction of a proposed nuclear power plant in Iran. The contract provided that AEOI could terminate the contract at any time for its convenience,

[1] Included within the definition of Iran were the Government of Iran, its agencies, instrumentalities, and political subdivisions. 31 C.F.R. §535.301 (a)(1) (Iran App. 15a).

and AEOI exercised this option on June 30, 1979. Petitioner, as assignee of Dames, brought suit to recover approximately $3,500,000 that allegedly was owing on alternative theories of breach of contract, account stated, agreed price, and reasonable value. On December 20, 1979; January 4, 1980; February 4, 1980; and May 12, 1980, the district court issued writs of prejudgment attachment against the assets of the Government of Iran, AEOI,[2] and the banking defendants.

On January 19, 1981, the United States became a signatory and adhered to the Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration") and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Declaration") (collectively referred to as the "Algerian Declarations"). (Pet. App. 21). General Principle B of the General Declaration obligates the United States:

> to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims . . . .

(Pet. App. 22).

In addition to, and independently of, this commitment, the General Declaration requires the return of Iranian assets within the jurisdiction of the United States or within the control of persons subject to the jurisdiction of the United States. General Declaration, General Principle A; ¶¶4-9 (Pet. App. 21, 23-26). Specifically, the United States agreed to bring about the immediate transfer of all gold bullion and other assets of Iran held in the Federal Reserve Bank, General Declaration, ¶4; the immediate transfer of all Iranian deposits and securities held in foreign branches of United States banks, *id.* ¶5; and the

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[2] AEOI had no financial assets in the state of California.

immediate transfer of all financial assets and other property of Iran wherever located, *id.* ¶¶8-9. Further, all deposits and securities in domestic branches of United States banks are to be transferred within six months by July 19, 1981. *Id.* ¶6.[3]

In order to implement the United States' interpretation of the Algerian Declarations, on January 19, 1981, former President Carter issued ten Executive Orders.[4] These Executive Orders, *inter alia,* revoked all licenses and authorizations for—and prohibited persons subject to the jurisdiction of the United States from—acquiring or exercising any right, power, or privilege by court order, including prejudgment attachment, or otherwise with respect to Iranian assets. Exec. Order No. 12,277, §1-102(a), (c), 46 Fed. Reg. 7,915 (1981) (Pet. App. 37); No. 12,278, §1-104(a), (c), 46 Fed. Reg. 7,917-18 (1981) (Pet. App. 40-41); No. 12,279, §1-102(a), (c), 46 Fed. Reg.

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[3] The commitments to transfer assets in ¶¶4-9 of the General Declaration were conditioned upon certain events, all of which have occurred: certification by Algeria that the 52 American nationals safely departed from Iran (¶9); adherence to the Declarations by the two contracting states (¶¶6, 8, 9); the establishment of a security account with a Central Bank (the Bank of England has been designated) to fund the claims program (¶¶6,7); and completion of escrow arrangements with the Central Bank (¶¶4,5). The security account established by ¶7 is to be funded from the returned assets in the initial amount of $1 billion and subsequently replenished by Iran to maintain a minimum balance of not less than $500 million. (Pet. App. 23-26).

[4] Exec. Order No. 12,276, 46 Fed. Reg. 7,913 (1981) (Iran App. 2a), authorizes certain escrow and depository agreements with the Bank of England; Exec. Order No. 12,277, 46 Fed. Reg. 7,915 (1981) (Pet. App. 36), directs the Federal Reserve Bank of New York to transfer Iranian funds to the escrow account at the Bank of England; Exec. Order No. 12,278, 46 Fed. Reg. 7,917 (1981), *as corrected,* 46 Fed. Reg. 10,895 (1981) (Pet. App. 39), directs overseas branches of the United States banks to transfer Iranian funds to the escrow account at the Bank of England; Exec. Order No. 12,279, 46 Fed. Reg. 7,919 (1981), *as corrected,* 46 Fed. Reg. 10,897 (1981) (Pet. App. 43), directs any branch or office of any bank subject to the jurisdiction of the United States, located within the United States, and holding Iranian funds to transfer these funds to the Federal Reserve Bank of New York for transfer to the escrow account at the Bank of England; Exec. Order No. 12,280, 46 Fed. Reg. 7,921 (1981) (Pet. App. 46), directs persons holding Iranian funds to transfer those funds to the Federal Reserve Bank of New York for transfer to the escrow account at the Bank of England; and Exec. Order No. 12,281, 46 Fed. Reg. 7,923 (1981) (Pet. App. 49), directs persons holding Iranian property, other than funds and securities, to transfer such property as directed by Iran. The remaining four Executive Orders are not pertinent to this case.

7,919 (1981) (Pet. App. 43); No. 12,280, §1-102(a), (c), 46 Fed. Reg. 7,921 (1981) (Pet. App. 47); No. 12,281, §1-102(a), (c), 46 Fed. Reg. 7,923 (1981) (Pet. App. 50). Additionally, each of the listed Executive Orders nullified outstanding attachments, injunctions, and other similar restraints process obtained against Iranian assets since November 14, 1979:

> All rights, powers and privileges relating to the properties described in Section 1-101 [and Section 1-102 of Exec. Order No. 12,278] of this Order and which derive from any attachment, injunction, other like proceedings or process, or other action in any litigation after November 14, 1979, at 8:10 a.m. E.S.T., including those derived from Section 535.504 of the Iranian Assets Control Regulations, other than rights, powers, and privileges of the Government of Iran and its agencies, instrumentalities, and controlled entities, whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power or privilege are hereafter barred from exercising the same.

Exec. Order No. 12,277, §1-102(b) (Pet. App. 37); No. 12,278, §1-104(b) (Pet. App. 41); No. 12,279, §1-102(b) (Pet. App. 44); No. 12,280, §1-102(b) (Pet. App. 47); No. 12,281, §1-102(b) (Pet. App. 50).

On January 27, 1981, petitioner moved for summary judgment against the Government of Iran and AEOI and for an order prohibiting either the Government of Iran or AEOI from submitting any evidence in opposition to the summary judgment motion.[5] The United States filed a Statement of Interest

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[5] The motion to prohibit the introduction of evidence by the Government of Iran and AEOI was based on the alleged failure of AEOI to produce certain of its personnel located in Iran for deposition in connection with a motion of the banking defendants to dismiss the complaint. Although the AEOI personnel were not deposed, the district court held a hearing on January 19, 1981, and on January 20 denied the banking defendants' motion to dismiss. On January 30, 1981, the Government of Iran and AEOI moved the district court to reconsider and vacate the discovery order, based in part on the resolution of the motion to dismiss. This motion has not been heard.

on January 29, 1981, requesting a stay of all proceedings until February 26, 1981, due to the United States' adherence to the Algerian Declarations and the need to enable President Reagan[6] to review the actions that the Executive deemed necessary for the implementation of the Declarations.[7] On February 2, 1981, the Government of Iran and AEOI moved the district court, based on the Algerian Declarations, for a continuance of the hearing on petitioner's summary judgment motion.

Notwithstanding the United States' adherence to the Algerian Declarations, its request for a stay of proceedings, the prohibition against judgments in licensed actions[8], and the motion of the Government of Iran and AEOI for a continuance, the district court on February 17, 1981, held a hearing and on February 18 entered summary judgment against the Government of Iran and AEOI in the amount of $3,788,930.79, plus interest. (Pet. App. 13). Petitioner immediately took action to execute on its judgment, and on February 19, 1981, filed its judgment both in the Superior Court of the State of Washington for Snohomish County, *Dames & Moore v. Atomic Energy Organization of Iran,* No. 81-2-00665-3 (Wash. Super. Ct.), and for Clark County, *Dames & Moore v. Atomic Energy Organization of Iran,* No. 81-2-00290-4 (Wash. Super. Ct.).

On February 24, 1981, President Reagan issued Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981) (Pet. App. 52), suspending all claims which could be presented to the Iran-United States Claims Tribunal ("Arbitral Tribunal") under Article II of the Claims Declaration[9] and explicitly ratifying the ten Executive Orders issued on January 19, 1981. Also on February 24, the Treasury Department issued regulations

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[6] President Reagan's involvement with the Algerian Declarations did not begin until January 20, 1981, the date on which he assumed the office of the President.

[7] The Statement of Interest also indicated that the United States would file implementing regulations by February 26, 1981.

[8] 31 C.F.R. §§535.203(e) (Iran App. 11a), 535.504(b)(1) (Pet. App. 82).

[9] The jurisdiction of the Arbitral Tribunal over any given claim is to be determined solely by the Arbitral Tribunal. Claims Declaration, Art. VI, ¶4 (Pet. App. 33).

implementing the United States' interpretation of the Algerian Declarations and the Executive Orders of January 19 and February 24, 1981.[10] *See generally* 46 Fed. Reg. 14, 330-14,337 (1981).

These regulations revoked all licenses and authorizations for acquiring attachments or injunctions against Iranian assets; nullified outstanding attachments and injunctions against Iranian assets obtained on or after November 14, 1979; and prohibited persons subject to the jurisdiction of the United States from seeking to attach or otherwise restrain Iranian assets. 46 Fed. Reg. 14,334 (1981) (to be codified in 31 C.F.R. §535.218) (Pet. App. 74), 46 Fed. Reg. 14,336 (1981) (to be codified in 31 C.F.R. §535.504(b)(1)) (Pet. App. 82).[11] Claims which could be presented to the Arbitral Tribunal were suspended. 46 Fed. Reg. 14,335 (1981) (to be codified in 31 C.F.R. §535.222(a)) (Pet. App. 78),[12] and persons within the United States (including banks) were directed to transfer to the Federal Reserve Bank of New York funds, securities, and deposits held by such persons on January 19, 1981. 46 Fed. Reg. 14,334 (1981) (to be codified in 31 C.F.R. §§535.213(a), 535.214(a)) (Iran App. 51a, 53a). With respect to other Iranian assets, the regulations required persons subject to the jurisdiction of the United States to transfer these assets as directed by the Government of Iran or its authorized agent. 46 Fed. Reg. 14,334 (1981) (to be codified in 31 C.F.R. §535.215) (Iran App. 54a).[13]

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[10] The regulations were made effective January 19, 1981. 46 Fed. Reg. 14,330 (1981).

[11] The express authorization for prejudgment attachments previously found in 31 C.F.R. §535.418 was revoked. 46 Fed. Reg. 14,337 (1981) (Iran App. 61a).

[12] The regulation prohibiting the entry of judgments, 31 C.F.R. §535.504(b)(1), was revoked and substituted with the regulation suspending claims. The regulation prohibiting judgments, 31 C.F.R. §535.203(e), was not amended or in any way affected.

[13] The regulations provided that the United States would not seek to impose sanctions on persons who failed to make the required transfers until the Secretary of the Treasury determined that the authority to order the transfers had been the subject of a definitive legal ruling. 46 Fed. Reg. 14,335 (1981) (to be codified in 31 C.F.R. §535.221(b)) (Pet. App. 76).

The United States then filed on or about February 26 and 27, 1981, a Statement of Interest in virtually every suit pending in the United States against Iran and its agencies and instrumentalities. The Statement of Interest requested the *vacatur* of all attachments and other restraints against Iranian assets, as well as a stay of litigation of those claims arguably within the jurisdiction of the Arbitral Tribunal.

Notwithstanding the February 24 Executive Order, the Treasury regulations, and the Statement of Interest, petitioner on March 4, 1981, obtained a writ of execution against assets of the Government of Iran in Snohomish County and on March 5 in Clark County. On March 5, 1981, petitioner also filed its judgment in the Superior Court of the State of Washington for King County. No. 81-2-03449-7 (Wash. Super. Ct.) The United States, on March 10, 11, and 12, 1981, filed Statements of Interest in the Superior Courts for Snohomish, King, and Clark Counties, respectively, requesting the *vacatur* of attachments and other restraints against Iranian assets and stays of the litigation of claims arguably within the jurisdiction of the Arbitral Tribunal.[14]

The genesis of this appeal was petitioner's attempt to enjoin the United States from enforcing the amended Treasury regulations. On April 27, 1981, suit was filed in the United States District Court for the Central District of California. *Dames & Moore v. Donald T. Regan,* No. CV 81-2064 LEW (C.D. Cal.) In its complaint petitioner sought:

> 1) an injunction preventing the United States and its agencies from taking any action to nullify or in any other way interfere with petitioner's February 19, 1981 summary judgment or petitioner's efforts to execute on its judgment;[15] and
>
> 2) a declaratory judgment declaring unconstitutional the Algerian Declarations, the February 24, 1981

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[14] These Statements of Interest were identical to the Statements the United States previously filed in other courts.

[15] Petitioner also filed a separate motion seeking a preliminary injunction.

> Executive Order, and all acts pursuant thereto seeking to nullify or interfere with the prejudgment attachments, summary judgment, the efforts of petitioner to execute on its summary judgment, and/or any statutes authorizing such acts.

(Pet. App. 1).

On May 13, 1981, the United States filed its opposition to petitioner's motion for a preliminary injunction and moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6).[16] After hearing these motions and a motion of the United States to stay the judgment entered in *Dames & Moore v. Atomic Energy Organization of Iran,* No. CV 79-4918 LEW, the district court filed an order on May 28, 1981,[17] denying petitioner's motion for a preliminary injunction, granting the United States' motion to dismiss, and granting the motion of the United States to stay the judgment in No. CV 79-4918 LEW. Since the lower court found resolution of the issues raised by the preliminary injunction and companion motions to be dispositive of the validity of the attachments in No. CV 79-4918 LEW, the court consolidated this issue in its order and vacated the attachments. (Pet. App. 106). The court stayed *vacatur* of the attachments until July 19, 1981, and certified for interlocutory appeal the issue of the authority of the Executive to suspend claims and nullify attachments.

On June 3, 1981, petitioner appealed to the United States Court of Appeals for the Ninth Circuit. (Pet. App. 163). After

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[16] In a separate action, Daniel, Mann, Johnson & Mendenhall brought suit against respondent seeking virtually the same relief as in the instant suit. Daniel, Mann, Johnson & Mendenhall v. Donald T. Regan, No. CV 81-1101 LEW (C.D. Cal., filed May 5, 1981). Both actions were consolidated by order of the district court on April 29, 1981.

[17] The order was entered on June 2, 1981.

the Treasury Department issued regulations on June 4,[18] requiring transfer of the assets attached by petitioner to the Federal Reserve Bank by June 19, 1981, petitioner moved the district court pursuant to Fed. R. Civ. P. 62(c) to enjoin respondents pending appeal from transferring, or requiring other persons to transfer, any Iranian assets subject to an attachment in favor of petitioner. The court granted the motion on June 8, also limiting the stay of the execution proceedings in the summary judgment pending appeal. (Pet. App. 167).

On June 10, 1981, petitioner filed a petition for writ of *certiorari* to the court of appeals before judgment seeking review of the order of the district court denying petitioner's motion for a preliminary injunction and granting respondents' motion to dismiss. This Court granted *certiorari* on June 11, 1981,[19] and allowed the Government of Iran and AEOI to intervene as respondents.

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[18] Based on the decisions in Chas. T. Main Int'l Inc. v. Khuzestan Water & Power Auth., No. 80-1027 (1st Cir. May 22, 1981), and American Int'l Group Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir. May 22, 1981) (opinion issued June 5, 1981), regulations were issued on June 4, 1981, requiring persons within the United States in the possession of Iranian funds, securities, or deposits to transfer these assets to the Federal Reserve Bank of New York by June 19, 1981. 46 Fed. Reg. 30,341 (1981) (to be codified in 31 C.F.R. §§535.213(b), 535.214(b)) (Iran App. 51a, 53a). Persons failing to comply with the transfer requirements would be subject to civil and criminal penalties. 31 C.F.R. §535.701 (1980) (Iran App. 44a). *Compare* 46 Fed. Reg. 14,335 (1981) (to be codified as 31 C.F.R. §535.221(b)) (Iran App. 55a) *with* 46 Fed. Reg. 30,341 (1981) (to be codified in 31 C.F.R. §535.221) (Iran App. 57a). *See generally* 46 Fed. Reg. 30,340 (1981) (Iran App. 59a).

[19] Due to this Court's grant of *certiorari*, the Department of the Treasury amended its regulations on June 12, 1981, to extend the June 19, 1981 date for the transfer of funds, securities, and deposits to the Federal Reserve Bank of New York to a date yet to be determined by the Treasury Department. 46 Fed. Reg. 31,630 (1981) (to be codified in 31 C.F.R. §§535.213(e), 535.214(e)) (Iran App. 52a, 53a). With respect to other assets, the United States will not seek to impose sanctions on any party who fails to transfer such assets before a date to be determined by the Treasury Department if these assets were subject to an attachment, injunction, or other similar restraint on June 19, 1981. 46 Fed. Reg. 31,630 (1981) (to be codified in 31 C.F.R. §535.215(c)) (Iran App. 54a).

SUMMARY OF ARGUMENT

As a matter of international law, the Algerian Declarations obligate the United States to terminate all litigation in United States courts based on claims of United States nationals against the Government of Iran and to remove judicial impediments to the promised transfer of Iranian assets by July 19, 1981. In the context of this particular case, the Algerian Declarations require the *vacatur* of petitioner's attachments, the dissolution of the summary judgment in the underlying action, and the discontinuance of all further proceedings based on petitioner's claim.

As a matter of domestic law, the Algerian Declarations are the "law of the Land." Because the Algerian Declarations were entered into by the President pursuant to his broad powers with respect to the conduct of foreign relations and pursuant to congressional authorization to accomplish such objectives, they are a valid and self-executing international agreement and provide the governing legal authority for this litigation.

The President is given wide authority in the International Emergency Economic Powers Act to control and direct the transfer of assets of foreign states in order to resolve crises in United States foreign relations. The President exercised that authority to avoid placing the United States in breach of its international obligations under the Algerian Declarations. Because petitioner's attachments were obtained subsequent to the presidential exercise of control over Iran's assets, the attachments must be vacated.

Settlement of claims of United States nationals against foreign states has long been a power accorded the federal government in the conduct of foreign affairs, necessary to the normalization of strained relations. The President, as the sole representative of the United States in foreign affairs, historically has negotiated and engaged in executive agreements settling such claims. Congress has not disapproved this practice in the Foreign Sovereign Immunities Act. That statute withdrew from the Executive only the power to make binding determinations of the sovereign immunity to be accorded foreign states in United States courts, but did not affect the separate power to settle claims of United States nationals.

The *vacatur* of petitioner's attachments does not constitute a taking of property belonging to petitioner. Petitioner's attachments were obtained subsequent to the President's exercise of control over Iranian assets, and petitioner thereafter could obtain no property right in the assets superior to that of the United States. Revocation of a license to attach, expressly made revocable, cannot give rise to a taking of petitioner's property.

Finally, the Court need not reach the question of whether the settlement of petitioner's claim constitutes a taking, because the Algerian Declarations provide for full payment of claims determined to be valid by the Iran-United States Claims Tribunal. Whether any taking has occurred cannot be assessed until such time as petitioner's claim has been adjudicated through the arbitral process. In addition, the preservation of sovereign immunity found in the Treaty of Amity and the Foreign Sovereign Immunities Act prohibits the entry of a valid judgment against the Government of Iran in a United States court. Therefore, whether petitioner's claim could have been satisfied by resort to United States courts is speculation, in which the Court traditionally has declined to engage.

The Court should affirm the dismissal of the complaint, denial of injunctive relief, and *vacatur* of the attachments and should direct the lower court to set aside the summary judgment and to discontinue all further proceedings based on that judgment or on petitioner's claim.

ARGUMENT

I. THE ALGERIAN DECLARATIONS BIND THE UNITED STATES AS A MATTER OF INTERNATIONAL AND DOMESTIC LAW, AND THE COURT SHOULD NOT PLACE THE UNITED STATES IN BREACH OF ITS OBLIGATIONS BY DECLINING TO UPHOLD EXECUTIVE ACTIONS INTENDED TO DISCHARGE THOSE OBLIGATIONS.

General Principle B of the General Declaration requires the termination of all litigation in United States courts involving the claims of United States nationals against the Government of

Iran, the nullification of all attachments and judgments obtained therein, and an end to attempts to execute on such judgments. (Pet. App. 21-22). Central to this appeal is the United States' separate and independent obligation to assure the free mobility of Iran's assets by no later than July 19, 1981. General Principle A; ¶¶4-9 (Pet. App. 21, 23-26). These obligations are binding on United States courts under international and domestic United States law.

The Declarations, without formal ratification by the United States Senate, are in fact "international agreements." *See Nuclear Tests Case* (Australia v. France), [1974] I.C.J. Rep. 253, 267-69, 57 I.L.R. 398, 412-14 (official assurances by the French Executive constitute an "international agreement"); *Rossi* v. *Brown,* 23 F.E.P. Cas. 1694, 1696 (D.C. Cir. Sept. 15, 1980); Memorandum by American Law Div'n, Congressional Research Serv., Library of Congress, *Definition of the Phrase International Agreement* (Mar. 17, 1978) ("international agreement" includes not only "executive agreements," but also executive assurances to another state); *Restatement (Second) of Foreign Relations Law of the United States* §115, Comment a, Illustration 2 (1965). "An international agreement is binding in accordance with its terms and each party has a duty to give them effect . . . . " Id. §138. Indeed, such an agreement is binding even if inconsistent with the domestic law of either Contracting State:

> The duty of a State to give effect to the terms of an international agreement to which it is a party, as stated in §138, is not affected by a provision of its domestic law that is in conflict with the agreement or by the absence of domestic law necessary for it to give effect to the terms of the agreement.

Restatement §140. As a matter of international law, the Algerian Declarations are binding upon the United States.

A failure of the United States timely to remove the judicial impediments to the return of Iran's assets, to nullify the

summary judgment obtained herein, or to discontinue this litigation could be a breach of the Declarations. Paragraph 17 of the General Declaration confers jurisdiction in the Arbitral Tribunal to hear any dispute concerning a party's performance of its obligations under the General Declaration and to award damages thereon. (Pet. App. 28). *See also* Claims Declaration, Art. II, ¶3; Art. IV, ¶3 (Pet. App. 31, 32).

Apart from being redressable before the Tribunal, a breach of the Declarations would violate international law. *Restatement (Second) of Foreign Relations Law of the United States* §3, Comment g; *see id.* Comment c. Courts generally will strain to decide cases in accord with the United States' international obligations. *E.g., Murray* v. *Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) (quoted in *Lauritzen* v. *Larsen,* 345 U.S. 571, 578 (1953)); *see Sociedad Nacional de Marineros de Honduras* v. *McCulloch,* 201 F. Supp. 82, 89 (D.D.C. 1962), *aff'd,* 372 U.S. 10 (1963). Indeed, this Court has long recognized that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana,* 175 U.S. 677, 700 (1900).

The Algerian Declarations are also binding on United States courts under domestic law. That the President had the power to make international agreements which are the law of the land under U.S. Const., art. II, §2, cl. 2, based upon his inherent power to speak for the United States to the world community, can scarcely be challenged. *United States v. Curtiss-Wright Export Corp.,* 229 U.S. 304, 318-22 (1936); *B. Altman & Co. v. United States,* 224 U.S. 583, 600-01 (1912); *Dole v. Carter,* 444 F. Supp. 1065, 1069-70 (D. Kan. 1977); W. McClure, *International Executive Agreements* 32 (1941). And, even though the Senate does not ratify such executive agreements, the Supreme Court has accorded them effect as domestic law. *United States v. Pink,* 315 U.S. 203 (1942); *United States v. Belmont,* 301 U.S. 324 (1937).

Both *Belmont* and *Pink* involved the Litvinov Agreement entered into by the President, and the Court applied that executive agreement as the "law of the Land." 301 U.S. at 331-

32; 315 U.S. at 230; *see Guerra v. Guajardo,* 446 F. Supp. 1046, 1055-56 (S.D. Tex. 1978) (mutual assistance agreement entered into by Customs Service with Mexico is binding as domestic law); *K.S.B. Technical Sales Corp. v. New Jersey Dist. Water Supply Comm'n,* 381 A.2d 774, 777-78 (N.J. 1977), *appeal dismissed,* 435 U.S. 982 (1978) (executive agreement concerning tariffs and trade is the "law of the Land" under the Supremacy Clause).[20]

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[20] In practice, it is the President through executive agreements (and not Congress through formal treaties) who negotiates and settles claims with foreign governments, usually accepting either lump-sum settlements or an agreement to arbitrate the claim in a neutral tribunal. *See* 79 Cong. Rec. 969-71 (1935) (listing 40 executive agreements, entered into between 1842 and 1931, providing for arbitration of claims against foreign governments). Congress itself recognized this when it enacted Pub. L. No. 92-403 (the "Case Amendment"), *codified at* 1 U.S.C. §112b (Supp. III 1979), which requires the Secretary of State to transmit the texts of international agreements (other than treaties requiring Senate consent) to Congress purely for informational purposes. H.R. Rep. No. 1301, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 3067. The Committee's Report noted:

> The right of the President to *conclude* executive agreements is not in question here, or in any way affected by S.596. Thus, the bill in no way transgresses the independent authority of the Executive in the area of foreign affairs.
>
> As the State Department itself has recognized, however, executive agreements have the same effect as treaties in international law. To the nations with which they are concluded, there is no difference between the two. That is, executive agreements no less than treaties bind the United States of America as a whole nation—not just the President or administration which makes them—under international law.

Id. at 3070 (emphasis in original). Just as this Court has treated a congressional refusal to grant the President certain authority as an implicit denial of that authority, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 586 (1952) (Black, J.), so also, the Court should treat the refusal by Congress, evident in the Case Amendment, to restrict the President's authority to enter into executive agreements as an implied authorization to engage in such agreements. Congress has not acted to withdraw this implicit authorization with respect to this agreement as it could do by passing an inconsistent statute. Therefore, the Algerian Declarations should be held unconstitutional only if "the Federal Government as an undivided whole lacks power" to enter into the agreement. 343 U.S. at 636 (Jackson, J. concurring) (describing his first category of presidential powers.)

Because both international and domestic law command that the Algerian Declarations are binding, this Court should uphold the Executive's actions intended to discharge its obligations under the Declarations.

II. THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT PERMITS THE PRESIDENT TO BLOCK, REGULATE, AND COMPEL TRANSFERS OF FOREIGN ASSETS DURING A NATIONAL EMERGENCY.

A. The President Possesses Express Statutory Authority To Regulate and Compel the Transfer of Foreign Assets.

Dames & Moore possessed a revocable, conditional license to obtain attachments, but was prohibited even during the term of the license from creating a lien, levying upon assets, taking assets into the marshal's possession, or executing upon judgment pursuant to any attachment. 31 C.F.R. §§535.201 (Iran App. 9a); 535.203(e) (Iran App. 11a); 535.310 (Iran App. 16a); 535.418 (Iran App. 23a); 535.504 (b)(2) (Iran App. 29a). Dames & Moore obtained this license pursuant to a valid Executive Order blocking all transfers in certain foreign property. This licence was revoked on January 19, 1981, according to its terms, and any rights or privileges which were enjoyed by Dames & Moore as a result of the attachments were nullified. Exec. Order No. 12,279, 46 Fed. Reg. 7,919-20 (1981) (Pet. App. 40-41). Dames & Moore never possessed any right in blocked assets which would prevent their transfer pursuant to Executive Order or Treasury regulations.

In prohibiting unauthorized transfers of foreign property and subsequently revoking conditional licenses for obtaining prejudgment attachments or other judicial orders, the President was acting pursuant to statutory authority conferred by Congress to control and compel the transfer of foreign assets. International Emergency Economic Powers Act, 50 U.S.C. §1702(a)(1) (Supp. III 1979) (the "IEEPA"). Although in enacting the IEEPA, Congress revised §5(b) of the Trading with the Enemy Act, 50 U.S.C. App. §§1-44 (1976 & Supp. III

1979) (the "TWEA"), to limit to some extent presidential powers over economic transactions during national emergencies, Congress placed no limits on the President's authority to block, regulate, or compel the transfer of foreign assets during such emergencies. *See generally* 50 U.S.C. §§1701-1706. The President was empowered to regulate judicial proceedings with respect to foreign property and to prohibit the creation of rights through judicial proceedings or otherwise which would be superior to the President's authority to respond to and resolve national emergencies. Neither the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1391(f), 1441(d), 1602-1611 (Supp. III 1979) (the "FSIA"), nor any other legislation places any further implied limits on such Presidential authority.

The actions taken by the President and the Treasury Department to block the transfer of foreign assets, to regulate judicial proceedings with respect to those assets, and to compel the transfer of assets, were expressly authorized by the International Emergency Economic Powers Act. The IEEPA provides that during declared national emergencies, the President may:

> investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. §1702(a)(1)(B).

The regulations implementing the blocking program imposed on November 14, 1979, closely followed the statutory language of the IEEPA. The President ordered blocked "all property and interests in property of the Government of Iran."

Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979) (Iran App. 50a). The Treasury Department regulations provided:

> No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after the effective date Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized.

44 Fed. Reg. 65,956 (1979) (to be codified in 31 C.F.R. §535.201(a)) (Iran App. 9a).

The Department of the Treasury subsequently authorized prejudgment attachments in judicial proceedings. 31 C.F.R. §§535.504(a), 535.418 (Iran App. 29a, 23a). However, transfers pursuant to any attachment were prohibited, and the licenses were subject to amendment, modification, or revocation at any time. *Id.* §535.805 (Iran App. 48a). Dames & Moore thereafter obtained prejudgment attachments on Iranian property pursuant to this general license on December 20, 1979, and January 4, February 4, and May 12, 1980. As a result, Dames & Moore's attachments were subject to further regulation by the Treasury Department under the asset-freeze program. This followed upon the United States' adherence to the Algerian Declarations when the Executive revoked the license authorizing attachments and directed the transfer of blocked assets.

The IEEPA gives the President the express power to "prevent and prohibit" "transfers" of foreign assets, to "direct and compel" the "transfer" and "withdrawal" of the assets, and to "nullify" any "rights" and "privileges" obtained. 50 U.S.C. §1702(a)(1)(B). The IEEPA does not limit the situs or entities to which the President may compel the transfer or direct the withdrawal of assets. Thus, the President's actions are precisely within the language of the IEEPA.

Nevertheless, petitioner and others in the Iranian litigation seek to limit the plain meaning of the statutory powers conferred. They have argued that Congress intended to limit the

powers of the Executive to regulate international transactions during national emergencies; that Congress never intended to permit the President to nullify inchoate "rights" created in foreign assets in this country; that the President could not revoke the license permitting attachments, since the President had, in issuing the licenses, created judicially conferred rights superior to the President's powers to regulate further frozen assets in connection with a national emergency. Finally, it is argued that the Foreign Sovereign Immunities Act of 1976 prohibited any exercise of emergency economic powers over foreign assets which became the subject of court orders.

None of these arguments has merit, as demonstrated in the following analysis.

B. The Legislative History of the IEEPA Indicates No Intent To Limit Beyond the Plain Meaning of the Statute Executive Authority To Transfer Assets.

Section 1702 of the IEEPA is virtually identical to Section 5(b) of the Trading with the Enemy Act, 50 U.S.C. App. §5(b). The IEEPA retained the broad powers of the President to regulate international economic transactions during national emergencies short of war.[21] Congress did not restrict, nor is there any evidence in the legislative history of an intent to restrict, the Executive's authority to regulate the creation or transfer of rights and interests in blocked property by court order.

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[21] Congress did not include in the IEEPA the following powers which were available to the President under the TWEA: "(1) the power to vest, *i.e.*, to take title to foreign property; (2) the power to regulate purely domestic transactions; (3) the power to regulate gold or bullion; and (4) the power to seize records." H.R. Rep. No. 459, 95th Cong., 1st Sess. 15 (1977) ("IEEPA House Report"). The United States has not "take[n] title to foreign property" and, therefore, no vesting is involved here. The case at bar also does not involve "purely domestic transactions." The IEEPA House Report states: "Examples of purely domestic transactions which in the past have been regulated under §5(b) include hoarding of gold by U.S. citizens and the extension of consumer credit by U.S. businesses." IEEPA House Report at 15 n.23.

Congress was aware of prior presidential blocking programs which prohibited and regulated court proceedings at the time IEEPA was enacted,[22] yet it chose not to restrict the Executive's regulation of court proceedings over foreign assets during national emergencies. Frozen assets historically have been the subject of domestic court actions by American nationals attempting to assert an interest in those assets. The Iranian litigation is only the most recent litigation against frozen foreign assets.[23] Under such circumstances foreign policy interests may conflict with the private interest of commercial litigants. While aware of this historic conflict between the national government and private litigants over the disposition of frozen foreign assets,[24] Congress nevertheless retained broad authority for the President to regulate such assets, including the authority to prohibit domestic court disposition or transfer of the assets absent license, as was required under the Cuban regulations at the time the IEEPA was passed. *See* note 24 *supra;* 31 C.F.R. §§515.201, 515.310, 515.504 (1980). Since Congress did not further limit the President's national emergency powers after reviewing previous and existing asset control programs, the conclusion is inescapable that Congress intended to confer on the President the power to regulate court proceedings affecting disposition of such assets during declared national emergencies.

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[22] IEEPA House Report at 5-6. *See, e.g.*, the Cuban Assets Control Regulations, 31 C.F.R. §515.504 (1963) (which were still in effect at the time IEEPA was enacted). *See also* Richardson v. Simon, 560 F.2d 500 (2d Cir. 1977), *appeal dismissed sub nom.* Richardson v. Blumenthal, 435 U.S. 939 (1978). *See also* Sen. Comm. on Government Operations, National Emergencies Act, S. Rep. No. 1168, 94th Cong., 2d Sess. 33-34 (1975), wherein the General Counsel of the Department of the Treasury indicated that §5(b) of the TWEA should be retained to deal with future international financial and investment problems. This concern led to the retention of basic regulatory powers when the IEEPA was passed. IEEPA House Report at 10.

[23] *E.g.*, Orvis v. Brownell, 345 U.S. 183 (1953) (Japanese assets); Zittman v. McGrath, 341 U.S. 471 (1951) (German assets); Propper v. Clark, 337 U.S. 472 (1949) (German assets); United States v. Pink, 315 U.S. 203 (1942) (Russian assets); United States v. Belmont, 301 U.S. 324 (1937) (Russian assets); Richardson v. Simon, 560 F.2d 500 (Cuban assets); Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir. 1966) (Cuban assets).

[24] Congress specifically conducted a review of previous and existing uses of §5(b) of the TWEA in preparing the IEEPA legislation. IEEPA House Report at 3-6.

Because Congress did not further restrict the President's IEEPA powers, it is not for the courts to do so. In connection with the administration of the Cuban freeze program, the Second Circuit refused to disturb Treasury regulation of Cuban assets beneficially owned by American citizens. The court concluded that under section 5(b) of the TWEA:

> Congress, both in 1917 and when it later amended the Act, intended to give the President broad discretion in administering the Act, and we hold that the Regulations, as applied in this case, are authorized by the Act.

Richardson v. Simon, 560 F.2d 500, 503 (2d Cir. 1977), *appeal dismissed sub nom. Richardson v. Blumenthal,* 435 U.S. 939 (1978) (footnotes and citations omitted). Citing *Mathews v. Diaz,* 426 U.S. 67 (1976), the Second Circuit refused to disturb the freeze regulations where Congress had investigated this impact, but refused to take action: "It may have been unwise for Congress not to have amended the Act in 1965, but it is not for this court to act when Congress chose not to do so." *Richardson v. Simon,* 560 F.2d at 504.

The legislative history of the IEEPA does not undermine the Executive's actions in ordering the transfer of blocked assets.

C. Congress Has Acquiesced in the President's Exercise of Authority To Nullify Attachments and Compel the Transfer of Iranian Assets.

Congress has reviewed the Algerian Declarations and Executive Orders and not signaled objection to the President's exercise of his IEEPA powers.

One of the significant changes from the TWEA made under the IEEPA was to require periodic reports by the President on national emergencies and to provide for congressional review of presidential actions and regulations. Congress set forth the review function as one of the primary purposes of the IEEPA:

> [G]iven the history of expansive use of emergency powers, the exercise of the emergency economic authorities should also be subject to strict procedural

> limitations, including consultation with Congress, periodic reporting requirements, and provision for termination of states of emergency by Congress and for veto by Congress of regulations promulgated under the international emergency economic powers statute. This should be accomplished at a minimum by conforming the use of the authorities to the procedural requirements of the National Emergencies Act. Where appropriate and necessary, additional procedural safeguards should be written into the new statute.

H.R. Rep. No. 459, 95th Cong., 1st Sess. 11 (1977) ("IEEPA House Report").[25] Accordingly, the IEEPA requires the President to report to Congress immediately upon the exercise of any authority and to issue follow-up reports to Congress at least once every six months. 50 U.S.C. §1703.

Congress also made the President's IEEPA authority subject to the reporting requirements of the National Emergencies Act. IEEPA, 50 U.S.C. §1703(d). Under the National Emergencies Act, the President must promptly transmit to Congress all orders, rules, and regulations promulgated in connection with national emergencies, 50 U.S.C. §§1631, 1641 (Supp. III, 1979), and Congress may thereafter terminate the emergency. 50 U.S.C. §1622(b).[26]

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[25] The veto of regulations proposed by the House was deleted from the Senate version and does not appear in the statute. *See* S. Rep. No. 466, 95th Cong., 1st Sess. 6, *reprinted in* [1977] U.S. Code Cong. & Ad. News 4540, 4544 ("IEEPA Senate Report").

[26] In addition, the Executive branch is required by the Case Amendment, 1 U.S.C. §112b, *see* note 20 *supra*, to transmit to Congress the text of international executive agreements, such as the Algerian Declarations, "as soon as practicable after such an agreement has entered into force with respect to the United States and in no event later than sixty days thereafter."

The Presidents submitted the required reports,[27] and Congress held hearings on the impact of the Algerian Declarations and the Executive Orders requiring transfer of Iranian assets.[28] However, Congress has taken no further action in response to the President's Executive Orders or subsequent amendment of the Treasury regulations to require transfer of Iran's assets, even though the Algerian Declarations and Executive Orders requiring transfer had been submitted to Congress by the President. No legislation has been recommended or reported by any committee of Congress, and no joint resolution to repeal the national emergency under the National Emergencies Act has been introduced.

Congress had done less in this context than it did in reviewing the Cuban Asset Control Regulations in 1965, which subsequently were left undisturbed in *Richardson v. Simon*, 560 F.2d 500. Thus, Congress has, by its inaction, acquiesced in and approved the President's actions as within the scope of IEEPA.

D. This Court and the Lower Courts in Iranian Assets Litigation Have Upheld the Executive's Statutory Powers To Regulate Transfers of Foreign Assets.

This Court has previously upheld the power of the President to regulate transfers of foreign assets, and two courts of appeal have specifically upheld the authority exercised with respect to Iranian assets.

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[27] *See* President Carter's report to Congress of January 19, 1981, concerning revocation of licenses, nullification of attachments, and transfer of assets, President's Message to Congress on the United States-Iran Agreement on the Release of the American Hostages, 17 Weekly Comp. of Pres. Doc. 3041-44 (Jan. 19, 1981), and President Reagan's report to Congress of February 24, 1981, concerning ratification of President Carter's actions and suspension of litigation, President's Message to Congress on the Suspension of Litigation Against Iran, 17 Weekly Comp. of Pres. Doc., 189-90 (Feb. 24, 1981).

[28] *Hearings on the Iranian Agreements Before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. (Feb. 17-18, 1981) (unpublished); *Hearings on the Iranian Assets Settlement Before the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. (Feb. 19, 1981) (unpublished); *Hearings on the Algerian Declarations Before the House Comm. on Foreign Affairs*, 97th Cong. 1st Sess. (Feb. 19, 1981) (unpublished).

In *Orvis v. Brownell,* 345 U.S. 183 (1953), this Court held that attachment liens acquired after the freeze of foreign assets created in a creditor no right to transfer against the United States' disposition of the assets. The facts were very similar to those presented in this case. On June 14, 1941, the Executive had frozen assets of Japan and Japanese nationals pursuant to section 5(b) of the TWEA. The freezing order recognized attachment liens, and petitioners had attached property in which Japanese nationals had an interest. Having obtained judgment, petitioners applied for a license to have the funds paid to them. The application was refused.

This Court held that an attachment lien acquired after the freezing order "did not permit the transfer of a property interest in the blocked funds which could be asserted against the Custodian". 345 U.S. at 187. Distinguishing *Zittman v. McGrath,* 341 U.S. 446 (1951), the Court held that the consent for attachments did not create any right to a transfer:

> [T]o so interpret it would ignore the express conditions on which the consent was extended. Realistically, these reservations deprive the assent of much substance; but that should have been apparent on its face to those who chose to litigate. The opportunity to settle their accounts with the enemy debtor was all that the permission to attach granted.

345 U.S. at 187. Similarly, petitioner Dames & Moore's revocable attachment license gives it no right to payment which would defeat the authority of the President to compel transfer pursuant to the IEEPA. Petitioner's attachments were revocable at any time, 31 C.F.R. §535.805 (Iran App. 48a), and the regulations never permitted the creation of an interest or a transfer to take place by reason of the attachments. 31 C.F.R. §§535.201, 535.203(e), 535.310, 535.418 (Iran App. 9a, 11a, 16a, 23a.)[29]

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[29] In view of these regulations, the district court in Marschalk Co. v. Iran Nat'l Airlines Corp., No. 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981), (Duffy, J.) ("*Marschalk*"), was constrained to admit that Marschalk's attachment "rights" were "inchoate", at best, and that Marschalk was prohibited from perfecting its attachment interest under New York law. *Marschalk*, typescript op. at 69, 76.

In distinguishing *Zittman,* the First Circuit found that, notwithstanding the authorization for attachments, the attachments would not defeat "the Custodian's (and, by clear implication, the President's) power to transfer, vest, and dispose of the assets in the manner he saw fit." *Chas. T. Main Int'l Inc. v. Khuzestan Water & Power Auth.,* No. 80-1027, typescript op. at 11 (1st Cir. May 22, 1981) ("*Chas. T. Main*"). The D.C. Circuit further distinguished *Zittman* on the ground that the United States had consistently taken the position that post-freeze attachments "must be vacated at its discretion", in contrast to the contradictory representations of the government in *Zittman. American Int'l Group Inc. v. Islamic Republic of Iran,* No. 80-1779, slip op. at 20 (D.C. Cir. June 5, 1981) ("*AIG*").[30]

This Court's prior decisions establish that, absent compelling indications to the contrary, judicial deference to the President's reliance on the IEEPA is particularly appropriate because the President has relied on it in his conduct of foreign relations "[which is] so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy,* 342 U.S. 580, 589 (1952). *See also Baker v. Carr,* 369 U.S. 186, 212 (1962) (Many questions touching foreign relations "uniquely demand single-voiced statement of the Government's views.")

> It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success of our aim achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory construction which would not be admissible were domestic affairs alone involved.

United States v. Curtiss-Wright Export Corp., 299 U.S. at 320. Similarly, judicial deference to the actions the President has

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[30] The D.C. Circuit noted that *Zittman* may have been overruled by *Orvis,* as suggested by the *Orvis* dissent. *AIG,* slip op. at 20 n.9.

taken to restore property as a result of negotiations with a foreign state is appropriate in this case.

Both the District of Columbia and First Circuits have ruled that the President's orders transferring assets are within the express terms of the IEEPA. *AIG*, slip op. at 19-23; *Chas. T. Main*, typescript op. at 9. The First Circuit deemed the language of the IEEPA to be "sweeping and unqualified", *id.*, and concluded that a "post-freeze" attachment did not give Main any "interest in the blocked assets as would later hamper the President in disposing of them." *Id.* at 10. The D.C. Circuit held that in ordering transfer of the assets "the President is acting pursuant to an unequivocal statutory grant of authority." *AIG*, slip op. at 22. The D.C. Circuit recognized that

> [j]udicial refusal to lift the restraints now blocking the transfer of Iranian assets, by contrast, could well have extremely serious consequences that the United States had every interest in avoiding. Differences in the federal policy interest, in the purpose for which attachments are sought, and in the alternatives open to the claimants provide ample grounds for not regarding *Zittman* as limiting the President's power to vacate the attachments against Iranian assets.

Id. (footnote omitted).[31]

[31] In addition, the Ninth Circuit denied an emergency motion for a stay pending appeal of an order vacating an attachment "in light of the broad executive [statutory] powers." Blount Brothers Corp. v. Government of Iran, No. 81-3256 (9th Cir. June 1, 1981), *as amended* (June 9, 1981).

The district courts, with one exception, also have held that the IEEPA empowers the President to revoke the conditional license for "post-freeze" attachments and compel the transfer of the blocked property. Blount Brothers Corp. v. Government of Iran, No. C79-1442V, typescript op. at 4-5 (W.D. Wash. May 11, 1981); Security Pacific Nat'l Bank v. Government of Iran, No. CV-79-4661 RJK, typescript op. 31-32 (C.D. Cal. Apr. 30, 1981), *appeal pending sub nom.* Hoffman Export Corp. v. Government of Iran, No. 81-5432 (9th Cir.); Unidyne Corp. v. Government of Iran, Civ. Act. No. 80-1029-A, typescript op. at 5 (E.D. Va. Mar. 30, 1981). ***But see Marschalk***, typescript op. at 74.

"Post-freeze" attachments and injunctions were vacated without an opinion in American Bell Int'l Inc. v. Islamic Republic of Iran, No. 80-0321

(footnote continues)

The President's actions compelling the transfer of Iran's assets, revoking the license for prejudgment attachments, and nullifying any rights created thereunder were within his maximum authority, under powers expressly conferred upon the Executive:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring.)[32]

Congress and the courts, in interpreting presidential power under freeze programs, have recognized the necessity for a program which places national above private interests, even in instances where those interests conflict. With respect to the TWEA, this Court stated:

> [C]ontemporaneous conditions and war legislation indicate a purpose to employ all legitimate means effectively to prosecute the war. The law should be

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(D.D.C. June 11, 1981) (oral ruling in partial tr.), *petition for cert. filed* (U.S. June 15, 1981) (No. 80-2111); Sperry Corp. v. Government of Iran, No. 80-2766 (D.D.C. June 11, 1981); Daniel, Mann, Johnson & Mendenhall v. Donald T. Regan, No. CV 81-1101 LEW (C.D. Cal. May 28, 1981) (consolidated with Dames & Moore v. Donald T. Regan, No. CV 81-2064 LEW); S.A. Enterprises Jan de Nul v. Brown & Root Int'l, Ltd., No. H-80-131 (S.D. Tex. May 18, 1981).

In Electronic Data Systems Corp. Iran v. Social Security Organization of the Gov't of Iran, No. CA-3-79-218-F (N.D. Tex. June 7, 1981), typescript op. at 16-17, Judge Porter concluded that the Executive Orders and regulations did not affect an attachment obtained "pre-freeze". The Government of Iran's position is that the Algerian Declarations require nullification of all attachments on Iranian assets.

[32] Examples of the "wide definition of presidential powers under statutory authorization" cited by Justice Jackson in *Youngstown*, 343 U.S. at 636 n.2, include Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103 (1948); Hirabayashi v. United States, 320 U.S. 81 (1943); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Mackenzie v. Hare, 239 U.S. 299 (1915).

> liberally construed to give effect to the purposes it was enacted to subserve . . . It was not necessary for Congress to ascertain the facts of or to deal with each case . . . It was peculiarly within the province of the Commander-in-Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war.

United States v. Chemical Foundation, 272 U.S. 1, 10, 12 (1926).

Consistent with prior decisions of this Court, the lower courts reviewing the Executive's actions in regulating the transfer of Iran's assets overwhelmingly have validated the presidential actions. A like result from this Court would honor the consistent judicial practice.

E. The Foreign Sovereign Immunities Act Does Not Supercede the President's Authority Under the IEEPA To Return Iranian Property.

The Foreign Sovereign Immunities Act of 1976 does not restrict the authority of the President to direct the transfer of the property of a foreign state pursuant to the IEEPA. Prejudgment attachments of the assets of a foreign state or its agencies and instrumentalities are prohibited unless the sovereign has explicitly waived its immunity. 28 U.S.C. §§1609; 1610(d).[33] The FSIA substantially limits the availability of prejudgment

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[33] The provisional remedy of a prejudgment attachment was not authorized by the FSIA or the Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. 3853 (entered into force June 16, 1957) ("Treaty of Amity"). The FSIA and the Treaty of Amity bar such provisional relief because of the absence of express waiver of immunity to prejudgment attachment. In New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., 502 F. Supp. 120, 124-27 (S.D.N.Y. 1980), *remanded on other grounds,* No. 80-6254 (2d Cir. Apr. 9, 1981), Judge Duffy correctly held that the *ex parte* orders of prejudgment attachment were not authorized by the FSIA or Treaty of Amity. *Accord,* Security Pacific Nat'l Bank v. Government and State of Iran, No. CV-79-4661 RJK, typescript op. at 34; E-Systems, Inc. v. Islamic Republic of Iran, 491 F. Supp. 1294 (N.D. Tex. 1980); Reading & Bates Corp. v. National Iranian Oil Co., 478 F. Supp. 724 (S.D.N.Y. 1979). The First Circuit noted that "there is a substantial unresolved question whether [plaintiff] was ever

(footnote continues)

attachment of the property of a foreign state under normal conditions. However, the FSIA does not address the authority of the President to deal with property subject to an attachment, and the legislative history of the FSIA evidences no congressional intent that an attachment be immune from the President's emergency powers.

By contrast, the IEEPA specifically addresses the authority of the President over the property of a foreign state in response to a declared national emergency. *See* pp. 18-19 *supra*. Had Congress intended to make section 1702 of the IEEPA subject to the FSIA, Congress could have done so explicitly, but it did not. The entire legislative history of the IEEPA, including over 200 pages of hearings, does not contain one single reference to the FSIA. S. Rep. No. 466, 95th Cong., 1st Sess. 5 (1977), *reprinted in* [1977] U.S. Code Cong. & Ad. News 4540; H.R. Rep. No. 459, 95th Cong., 1st Sess. (1977); *Hearings on Emergency Controls on Int'l Economic Transactions Before the Subcomm. on Int'l Economic Policy and Trade of the House Comm. on Int'l Relations*, 95th Cong., 1st Sess. (1977).

That the FSIA does not pertain to the emergency powers of the President is further confirmed by the absence of any reference in the FSIA or its legislative history to the TWEA, predecessor to the IEEPA, or to the foreign assets control programs in effect in 1976. At the time the FSIA was enacted, regulations prohibited unlicensed attachments involving the property of North Korea, North Vietnam, and Cuba. 31 C.F.R. §500.201, 500.310, 515.201, 515.301 (1980). If Congress had intended to limit the President's authority to control attachments of the property of foreign states, some reference in the FSIA's legislative history to the TWEA or to the foreign assets control programs then in effect would have been expected.

Moreover, the provisions of the FSIA were not viewed as inconsistent with the President's foreign affairs powers. During

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entitled to obtain attachments and injunctions against the assets of the Iranian defendants. . . . [under the FSIA]." *Chas. T. Main*, typescript op. at 13 n.12.

The United States has supported this argument on several occasions. *See* Brief for the United States as *Amicus Curiae*, Electronic Data Systems Corp. Iran v. Social Security Organization of the Gov't of Iran, 610 F.2d 94 (2d Cir. 1979).

the hearings on the FSIA, the Legal Adviser to the State Department testified that the President's power to espouse and settle the claims of United States nationals would continue as an alternative to the remedies provided in the FSIA. *Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary,* 93d Cong., 1st Sess. 26 (1973) (testimony of Charles N. Brower) ("1973 House FSIA Hearings"). Nor would it be correct to imply an inconsistency from the deletion of "future agreements" from sections 1604 and 1609. The House Report states:

> In Sections 1604 and 1609 of the bill, the committee has preserved the reference to existing international agreements but has deleted the language that would make this bill subject to "future" agreements. Mention of future agreements was found to be unnecessary and misleading. The purpose for including the reference was to take into account the possibility that sovereign immunity might become the subject of an international convention. Such a convention, would, under Article VI of the Constitution, take precedence, whether or not the bill was made subject to future international agreements.

H.R. Rep No. 1487, 94th Cong., 2d Sess. 10, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6608. Congress did acknowledge that by virtue of the Supremacy Clause, U.S. Const., art. VI, future agreements would take precedence and the language was surplusage. *See also* 1973 House FSIA Hearings at 87 (remarks of Rep. Moorhead) ("Of course, we know that because of the constitutional authorities, the rulings of the court on executive agreements, treaties and so forth, that that can take preeminence over a statute.").

The two statutes, the FSIA and the IEEPA, are consistent. The FSIA does not create an underlying right of attachment. Rather, it bans the exercise of such a right in all but a few instances. Its applicability under normal circumstances is conditioned by the IEEPA's emergency powers. In *United States v. Yoshida Int'l, Inc.,* 526 F.2d 560, 568 (C.C.P.A. 1975), the Court of Customs and Patent Appeals held that the President has authority under the TWEA to impose an import

surcharge during a declared economic emergency, even though the surcharge was contrary to the Tariff Act of 1930, the Trade Expansion Act of 1962, and the Trade Act of 1974. The court rejected the contention that the President's powers under an emergency statute, the TWEA, are limited by other statutes dealing with the same subject matter under normal conditions. The court held:

> Congress has said what may be done with respect to foreseeable events in the Tariff Act, the TEA [Trade Expansion Act of 1962], and the Trade Act of 1974 (all of which are in force) and has said what may be done with respect to foreseeable events in the TWEA. In the latter, Congress necessarily intended a grant of power adequate to deal with national emergencies. *It was error below to apply the same approach to determination of intent when Congress is legislating for normal conditions (where the grant is properly narrow) and when Congress is legislating for national emergency conditions (where the grant must be of greater breadth).* We find it unreasonable to suppose that Congress passed the TWEA, delegating broad powers to the President for periodic use during national emergencies, while intending that the President, when faced with such an emergency, must follow limiting procedures prescribed in other acts designed for continuing use during normal times.

526 F.2d at 568 (emphasis added).

Congress has provided in the FSIA for actions with respect to a foreign state's property by a private litigant under normal conditions, whereas in the IEEPA Congress has said what may be done with respect to a foreign state's property by the President during a declared national emergency.

This reconciliation of the two acts is consistent with the established principles of statutory construction that statutes should be construed so as to avoid conflict between them, *e.g.*, *Administrator, Federal Aviation Admin. v. Robertson,* 422 U.S. 255, 265-66 (1975); *Morton v. Mancari,* 417 U.S. 535, 551 (1974); that repeals by implication are disfavored, *id.*; that

statutes dealing with a national emergency are to be construed broadly, *e.g., Propper v. Clark,* 337 U.S. 472, 481 (1949); *United States v. Yoshida Int'l Inc.,* 526 F.2d at 568; and that statutes should not be interpreted in a manner that could result in the breach by the United States of an international agreement, *e.g., Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804); *Filartiga v. Pena-Irala,* 630 F.2d 876, 887 n.20 (2d Cir. 1980). By contrast, a strained interpretation of the FSIA which attempts to inject into that Act a limitation upon the emergency powers delegated to the President in the IEEPA—absent any reference to emergency powers in the FSIA or its legislative history—offends all of these principles of statutory construction.

The IEEPA was intended to confer in the President the power to compel transfer of assets to the Federal Reserve Bank and ultimately to an international tribunal for claims settlement and to the foreign state owning the assets. The plain language and legislative history of the IEEPA, congressional acquiescence in the specific actions here taken by two Presidents, and the previous decisions of this Court and lower courts in these cases confirm that the Executive actions are within the statutory authority expressly conferred by the IEEPA and are not diminished or otherwise affected by the FSIA and should be sustained by this Court.

III. PETITIONER'S CLAIM HAS BEEN VALIDLY SETTLED BY THE ALGERIAN DECLARATIONS, AND THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT IMPAIR THE VALIDITY OF THIS SETTLEMENT.

A. The Executive Has Authority To Settle Petitioner's Claims by the Algerian Declarations.

The Algerian Declarations embody a binding international agreement between the Governments of the United States and Iran that, *inter alia,* permanently settles the claims of United States nationals against Iran. General Principle B of the General Declaration, which was in full force and effect and binding on the United States as of January 19, 1981, before

petitioner obtained its summary judgment, requires termination of litigation in United States courts involving claims of United States nationals against the Government of Iran. General Principle B also requires the nullification of judgments entered in such actions. (Pet. App. 21-22).

In order to implement its interpretation of General Principle B, the Executive on February 24, 1981, suspended all claims in United States courts against the Government of Iran and Iranian entities. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981) (Pet. App. 52); 46 Fed. Reg. 14,335 (1981) (to be codified in 31 C.F.R. §535.222) (Pet. App. 78). Because the Algerian Declarations settle the claims underlying this action and must be given effect, the summary judgment entered below should be vacated; all further proceedings before the district court, discontinued; and all further attempts to execute on the judgment, prohibited.

In this case summary judgment is particularly improper because it was entered on February 18, 1981, after the Algerian Declarations were adhered to and in effect and notwithstanding Treasury Regulations specifically prohibiting the entry of judgments in actions against Iran or its agencies or instrumentalities. 31 C.F.R. §§535.504(b)(1), 535.203(c) (1980) (Iran App. 29a, 10a).[34]

The intent of the Declarations was manifestly to relieve the Government of Iran of any further obligation to defend against suits of United States nationals in United States courts. Correspondingly, the United States has settled all its nationals' claims against the Government of Iran in the framework of binding arbitration of the vast number of claims, Claims Declaration, Art. II, VII, (Pet. App. 30-31, 33-34) and other consideration, such as the replenishable awards fund. General Declaration, ¶7 (Pet. App. 25). The Tribunal's awards are final, binding, and enforceable worldwide, Claims Declaration, Art. IV, ¶¶1,3

[34] Although the court in *AIG* refused to vacate a partial summary judgment, merely remanding the matter to the lower court and staying all proceedings, slip. op. at 32-34, the court did not address the argument that entry of the summary judgment was prohibited. *Id.* at 34.

(Pet. App. 32); and the Tribunal has plenary authority not only to determine its jurisdiction upon request by either Government, Art. VI, ¶4 (Pet. App. 33), but also to enter awards to assure enforcement of the parties' respective obligations under the Algerian Declarations. Art. IV, ¶3 (Pet. App. 32); *see* General Declaration, ¶17 (Pet. App. 28-29).

This Court specifically has validated the President's power to settle claims of American citizens against foreign states, particularly when the resolution of these disputes was integrally connected with normalizing the United States' relations with a foreign state. *United States* v. *Pink*, 315 U.S. at 229-30.

> Power to remove such obstacles to full recognition of settlement of claims of our nationals . . . certainly is a modest implied power of the President . . . . No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs . . . is to be drastically revised.

Id.; *see id.* at 240 (Frankfurter, J., concurring).

Numerous authorities support the power of the President to settle private grievances against foreign countries as part of an overall plan to normalize relations with that country. *See Nielsen v. Secretary of Treasury*, 424 F.2d 833, 840-41 (D.C. Cir. 1970) (one purpose of the Executive's freezing the assets of an unfriendly foreign state is to use the assets as a bargaining chip in negotiations to reestablish friendly relations); *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951) (L. Hand, J.) ("[C]ontinued mutual amity between [this] nation and other powers again and again depends upon a satisfactory compromise of mutual claims."); *Dole v. Carter*, 444 F. Supp. 1065, 1069 (D. Kan. 1977) (only the President can determine what foreign states this country will recognize; the power to remove all obstacles to full recognition includes the power to arrange for compromise of grievances against the foreign state); *Avramova v. United States*, 354 F. Supp. 420, 422 (S.D.N.Y. 1973) (executive agreement settling claims of United States citizens

against foreign countries is within the implied powers given to the Executive by the Constitution); S. Crandall, *Treaties: Their Making and Enforcement* 108 (2d ed. 1916) ("The President, being entrusted with the right of conducting all negotiations with foreign governments, is the sole judge of the expediency of instituting, conducting or terminating them in respect of reclamations for injuries sustained by citizens abroad.").

Accordingly, when the Executive enters into an agreement—such as the Algerian Declarations—which settles its nationals' claims incident to normalizing relations with another sovereign, it is acting within its authority. Because the Algerian Declarations constitute an executive agreement within the President's traditional foreign affairs powers, they are the law which governs this litigation.[35] Similarly, the act of adherence to the Declarations operated to prohibit the entry of any judgment in this case subsequent to that date. But even if the judgment had been entered prior to the date on which the Algerian Declarations became effective, the judgment must be set aside because the Declarations change the applicable law with respect to claims and derivatively with respect to suits brought on those claims. Because the underlying claim has been settled, the prior entry of a judgment on that claim can be of no effect.

This result is further compelled by the seminal case of the *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801). In that case the United States seized a French vessel. The Circuit court found such seizure to be proper under the law of the United States, entitling the United States to condemn the ship and take its cargo as a prize. While the case was pending on appeal, the United States (through the Executive Branch) and France signed a convention that directed all captured property, not definitively condemned, to be mutually restored. In an opinion written by Chief Justice Marshall, the Supreme Court ordered the judgment vacated:

> [T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful

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[35] *See* note 20 *supra*.

> when rendered but which cannot be affirmed, but in violation of law, the judgment must be set aside.

5 U.S. (1 Cranch) at 110.

The Court should enforce the settlement agreement controlling this suit and direct the lower court to discontinue further proceedings in this action. Just as in *The Schooner Peggy*, the judgment entered by the district court must be set aside, for the President, by settling the claim underlying the judgment on behalf of the plaintiff, has thereby changed the law governing this litigation. Plaintiff's claim is no longer cognizable in United States courts.

B. The Foreign Sovereign Immunities Act Does Not Interfere with the Executive's Authority To Settle Claims.

The courts of appeals that have addressed the question of the President's authority to settle claims of United States nationals in the context of the Algerian Declarations have concluded that the President possesses such authority. *AIG*, slip op. at 18, 30; *Chas. T. Main*, typescript op. at 22. Appellees in both cases challenged the authority of the President on the ground that the FSIA, by giving jurisdiction to United States courts to hear claims of United States nationals against foreign states, withdrew the authority of the President to settle such claims. The First and District of Columbia Circuits rejected this argument, as should this Court.

Both the *AIG* and the *Chas. T. Main* courts reasoned that the authority to settle claims did not interfere with the jurisdiction of United States courts pursuant to the FSIA, because the President had acted primarily with respect to the claims and not with respect to the lawsuits *per se*. Both courts concluded that the actions must be dismissed for failure to state a claim, once the claim had been settled by the President. *AIG*, slip op. at 23; *Chas. T. Main*, typescript op. at 16. The authority of the President to settle an international claim can no more interfere with the jurisdiction of a court than can the authority of any plaintiff to settle his claim.

The claims of a national against a foreign state are the claims of his sovereign under international law. L. Henkin, *Foreign Affairs and the Constitution* 262 (1972); Q. Wright, *The Control of American Foreign Relations* 244 (1922). The sovereign owns its national's claim under international law to the same extent that the national himself does. Thus, the sovereign may settle the claim, if it chooses, without consultation with or authorization from the national. The powers of the sovereign in international affairs are not solely derived from the Constitution but also, although limited by the Constitution, derive from the nature of a sovereign nation in a world community. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 315-18. Where the sovereign has the power to settle the claims of its nationals, and where Congress has not acted to interpose itself in the settlement process or to limit the President's authority to do so, *AIG*, slip op. at 30, the Executive's authority must be upheld.

Both the *AIG* and *Chas. T. Main* courts determined that the President's claims settlement authority lies within the second category of Presidential powers delineated by Justice Jackson in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 337:

> When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

The *Chas. T. Main* court reasoned that the imperatives of events and contemporary imponderables necessitated the "authority to remove impediments to the peaceful resolution of international disputes" in order to meet the responsibilities of

presidential office. Typescript op. at 20. The legislative history of the FSIA is bare of any indication that Congress intended to thereby deny the President's authority to settle claims of United States nationals.[36] Congressional awareness of executive claims settlement agreements must be assumed. As the court noted in *AIG*: "[T]he President has entered into binding settlements with foreign nations compromising the claims of U.S. nationals at least 10 times since 1952 without seeking the advice and consent of the Senate." Slip op. at 28 (citations omitted). On this basis the court ruled that the President's suspension of claims "was an example of a continual executive practice in which the Congress has, at the very least, acquiesed." *AIG*, slip op. at 18.[37]

> [T]he fact that the State Department may no longer, in the normal course of events, dispose of commercial litigation against a foreign state by asserting that state's immunity from suit does not reflect adversely on the President's long accepted power, in times of international emergency, to settle or provide substitute means for the resolution of the underlying claims.

Chas. T. Main, typescript op. at 21.

Only two district court judges have disagreed with the unanimous opinions of these courts of appeals and the numerous district courts that have upheld the President's authority to

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[36] This silence is even more noteworthy in that Congress, when considering the impact of the IEEPA on the President's powers a year later, specifically stated, "Nothing in this act is intended by the committee. . . to impede the settlement of claims of U.S. citizens against foreign countries." S. Rep. No. 466, 95th Cong., 1st Sess. 6, *reprinted in* [1977] U.S. Code Cong. & Ad. News 4540, 4544. If Congress had intended or anticipated that the FSIA would prevent the President from settling claims, Congress undoubtedly would have given some such indication. In contrast, in the context of the IEEPA, a statute much more likely to affect claims settlements, which are often born in crisis, Congress took care to avoid even the appearance of impairing the President's authority.

[37] This acquiescence is further demonstrated in that, subsequent to issuance of the Algerian Declarations, both the Senate Foreign Relations Committee and the House Committee on Foreign Affairs held hearings concerning the Algerian Declarations (on February 17 and 19, 1981, respectively). *See* note 28 *supra*.

enter into and implement the Algerian Declarations.[38] *Marschalk Co., v. Iran Nat'l Airlines Corp.*, No. 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981) (Duffy, J.); *Electronic Data Systems Corp. Iran v. Social Security Organization of the Government of Iran*, No. CA3-79-218-F (N.D. Tex. June 7, 1981) (Porter, J.) ("*EDSCI*"). Both courts found that Congress, in enacting the FSIA, had withdrawn the authority of the President to settle these claims. *Marschalk*, typescript op. at 25; *EDSCI*, typescript op. at 22. These rulings, however, fail to distinguish between the President's former authority to assert sovereign immunity on behalf of foreign sovereigns and the power to settle a United States national's claim against a foreign state.

Under pre-FSIA practice, when the Executive suggested that a court decline to hear a claim based on the foreign state's sovereign immunity, the claim was not extinguished, although the suit was subject to dismissal. The plaintiff could thereafter still seek to have the State Department espouse his claim or could bring an action in the courts of the foreign sovereign or in other foreign jurisdictions where assets of the foreign states were located. However, when a national's claim is settled by his sovereign, he no longer has a claim which can be presented in another forum. The conclusion is inescapable, therefore, that the authority to control the deference a United States court should show a foreign sovereign is separate and distinct from the authority to settle claims against a foreign state. The failure to perceive this distinction prompted both district courts in *Marschalk* and *EDSCI* to find that the FSIA withdrew this latter power of the President's, admittedly "[d]espite the lack of any legislative history bearing directly on the issue." *EDSCI*, typescript op. at 22. Congress apparently apprehended a distinction lost on these two courts.

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[38] *See* Partial tr. of hearing, American Bell Int'l Inc. v. Islamic Republic of Iran, Civ. Act. No. 80-0321 (D.D.C. June 11, 1981), *appeal docketed*, No. 81-1656 (D.C. Cir. June 11, 1981), *petition for cert. filed* (U.S., June 15, 1981) (No. 80-2111); Blount Bros. Corp. v. Government of Iran, Civ. No. 79-1142-V (W.D. Wash. May 1, 1981), *appeal pending*, No. 81-3256 (9th Cir.); Security Pacific Nat'l Bank v. Government and State of Iran, CV 79-4661 RJK (C.D. Cal. Apr. 30, 1981), *appeal pending sub nom.* Hoffman Export Corp. v. Government of Iran, No. 81-5432 (9th Cir.); Chas. T. Main Int'l Inc. v. United States, Civ. No. 80-315-C (D. Mass. Mar. 17, 1981), *aff'd*, No. 81-1176 (1st Cir. May 22, 1981).

Absent any evidence that the FSIA was intended to preempt the President's congressionally recognized authority to negotiate and enter into claims settlement agreements, a construction of that statute to hold the President's actions unconstitutional should be avoided. As the court in *Chas. T. Main* concluded, the FSIA was not meant to "eradicate 'executive branch flexibility in an international crisis.' " Typescript op. at 20. In the complete absence of contrary congressional disapproval, this Court must uphold the President's authority to settle these claims and, therefore, should direct the district court to discontinue further proceedings upon setting aside the summary judgment.

IV. NO TAKING COGNIZABLE BY THIS COURT HAS OCCURRED.

A. Nullification of Petitioner's Prejudgment Attachments Was Not a Taking Under the Fifth Amendment.

Because petitioner could never have acquired a property interest in the attached assets, the nullification of prejudgment attachments obtained under a revocable license did not constitute a taking under the Fifth Amendment, and petitioner, therefore, is not entitled to compensation. Petitioner did not have an outstanding attachment on the date former President Carter blocked Iran's assets.[39] The Treasury Department regulations promulgated to implement the Executive Order blocking Iran's assets specifically prohibited attachments, liens, executions, garnishments, or other judicial process with respect to Iranian property, unless authorized. 31 C.F.R. §535.203(e) (1980) (Iran App. 11a); 44 Fed. Reg. 65,957 (1979) (to be codified in 31 C.F.R. §535.201(a)) (Iran App. 50a); 31 C.F.R. §535.310 (Iran App. 16a). No such authorization existed.

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[39] The Government of Iran contends that General Principle B of the General Declaration commands nullification of all provisional restraints against movement of Iranian assets irrespective of when the injunctions or attachments were obtained. Assuming *arguendo* that the prejudgment attachments had been obtained prior to November 14, 1979, no compensable taking would exist because sovereign immunity would have prevented issuance of the writ. 28 U.S.C. §§1609, 1610(a); *see* note 33 *supra*.

On November 19, 1979, the regulations were amended to provide, *inter alia,* that the regulations themselves and any licenses or authorizations issued thereunder could be amended, modified, or revoked at any time. 31 C.F.R. §535.805 (Iran App. 48a). Thereafter, the regulations were amended to allow certain judicial proceedings to go forward with respect to Iranian property. 31 C.F.R. §535.504(a) (Iran App. 29a). This regulation was interpreted as authorizing prejudgment attachments. 31 C.F.R. §535.418 (Iran App. 23a). However, §535.418 specifically precluded from the authorization for prejudgment attachments the payment or delivery of any attached property to a court, sheriff, marshal, or similar entity. The intent of the Executive, as manifested in the regulations, was only to allow each claimant to establish its priority with respect to Iranian assets in the event the assets were unblocked and made available for use in litigation in the United States courts.

This event never transpired, and by the January 19, 1981 Executive Orders and the implementing regulations, outstanding attachments were nullified and future attachments were prohibited. Exec. Order No. 12,277, §1-102(b), (c), 46 Fed. Reg. 7,915 (1981) (Pet. App. 37); No. 12,278, §1-104(b), (c), 46 Fed. Reg. 7,917 (1981) (Pet. App. 41); No. 12,279, §1-102(b), (c), 46 Fed. Reg. 7,919 (1981) (Pet. App. 44); No. 12,280, §1-102(b), (c), 46 Fed. Reg. 7,921 (1981) (Pet. App. 47); No. 12,281, §1-102(b), (c) 46 Fed. Reg. 7,923 (1981) (Pet. App. 50); 46 Fed. Reg. 14,334 (1981) (to be codified in 31 C.F.R. §535.218(b), (c)) (Pet. App. 75); 46 Fed. Reg. 14,336 (1981) (to be codified in 31 C.F.R. §535.504(b)(1)) (Pet. App. 82).

The two courts of appeals to have addressed the so-called "taking" issue denied that the nullification of the prejudgment attachments constituted a taking by the United States. ***AIG,*** slip op. at 37-38; ***Chas. T. Main,*** typescript op. at 12-13. Whatever "rights" claimants might have had as to the attached property were subordinated and subject to the Executive's IEEPA powers. In the exercise of these powers, the Executive granted a limited license to obtain prejudgment attachments, but reserved

the right to revoke any license therefor in order to enable the United States to discharge certain of its obligations under the Algerian Declarations. Holding that the *vacatur* of attachments and injunctions in these circumstances occasioned no Fifth Amendment "taking", the District of Columbia Circuit explained:

> [V]acation of the attachments is not a taking for which just compensation must be paid. Revocation of a license to attach, explicitly made revocable, cannot be considered a taking, because those claimants proceeding under such license had no entitlement to the attachments that would constitute property capable of being taken . . . .
>
> . . . The holders of the interests had no reasonable expectation that, against the factual backdrop of an unresolved international crisis, the President would not revoke what he had granted . . . . Without a reasonable expectation that their restraints were protected, the appellees cannot claim any property interest in those restraints. If so, the President took nothing on January 19.

AIG, slip op. at 38 (footnotes omitted). Similarly, the First Circuit ruled that

> the compensation clause of the fifth amendment of the Constitution does not constrain the President in nullifying Main's attachments. Main's argument based on the compensation clause is undercut by the fact that its "interest" in Iranian assets was *ab initio* subordinate to the President's IEEPA powers . . . . Since Main's "property interest" in the Iranian assets was defined and delimited by IEEPA's terms, it could not have been "taken" by presidential action effected pursuant to the statute.

Chas. T. Main, typescript op. at 12-13.

The lone opinion finding nullification of "post-freeze" attachments to be a "taking" is Judge Duffy's opinion in *Marschalk*, typescript op. at 75-82. That court's conclusion was

based on the assumption that a lien was created upon the attached property by the steps plaintiff took to levy on the property. *Id.* at 76. This result ignores completely the proscriptions imposed by the Treasury Department regulations. All transfers of property in which Iran had an interest were prohibited, unless authorized. 44 Fed. Reg. 65,957 (1979) (to be codified in 31 C.F.R. §535.201(a)) (Iran App. 50a). Included within the definition of "transfer" were "the creation or transfer of any lien" and the "levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order." 31 C.F.R. §535.310 (1980) (Iran App. 16a). Further, the regulations prohibited unauthorized attachments, liens, executions, garnishments or other judicial process. 31 C.F.R. §§535.201, 535.203(e), 535.310 (Iran App. 9a, 11a, 16a).

The regulations distinguished between attachments, on the one hand, and liens, levies, and executions, on the other. *Id.* The authorization for prejudgment attachments in 31 C.F.R. §§535.504(a), 535.418 (Iran App. 29a, 23a), did not authorize the creation of a lien against, or the levy on property subject to, prejudgment attachment, and no such authorization can be inferred from these or other regulations. Just as prejudgment attachments could not issue unless specifically authorized, liens or levies could not be created or effected without specific authorization. Since such regulations were never promulgated, Judge Duffy erred in finding that a lien was created upon attached property. Consequently, property interests could not be created by the prejudgment attachments, and no "taking" under the Fifth Amendment occurred.

B. The Issue Whether Any Obligation Can Be Imposed on the United States To Compensate Petitioner for the Settlement of Claims Under the Algerian Declarations Is Not Ripe for Review.

The Government of Iran takes no position with respect to petitioner's contention that the settlement of claims by the Algerian Declarations is a "taking" for which petitioner is entitled to compensation. Regardless of the merits of petition-

er's arguments, however, the issue of compensation is not ripe for review and should not be addressed by the Court at this time.

It is far from clear whether petitioner, or any other American claimant, will suffer any loss at all, since petitioner may well have a complete remedy with the Arbitral Tribunal established by the Algerian Declarations. In any event, federal courts will not intervene lightly where the prospect of a loss is so tenuous. *Cf. Union Carbide Agricultural Prods. Co. v. Costle,* 632 F.2d 1014 (2d Cir. 1980) (a very strong showing of uncompensated taking must be made to persuade the Court to thwart a governmental regulation); *Nielsen v. Secretary of Treasury,* 424 F.2d 833 (D.C. Cir. 1970) (courts will not obstruct Executive's regulation of foreign assets even though claimants may suffer temporary or partial losses).

The Arbitral Tribunal is to be funded initially with $1 billion, and thereafter a minimum balance of $500 million will be maintained. General Declaration ¶7 (Pet. App. 25). If the Arbitral Tribunal finds that petitioner is entitled to an award, petitioner will be entitled to the full amount of that award, not a reduced percentage. Further, awards of the Arbitral Tribunal specifically are made enforceable in the courts of any nation. Claims Declaration, Art. IV, ¶3 (Pet. App. 32). To the extent petitioner is dissatisfied with the remedy of the Arbitral Tribunal or might somehow be deprived of that remedy, petitioner must await the decision of the Tribunal on its claim before it legitimately can claim any loss. The mere prospect of injury triggers no Fifth Amendment protections.[40]

The District of Columbia Circuit and the First Circuit held that the issue of compensation for the settlement of claims under the Algerian Declarations is not ripe for review. *AIG,*

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[40] Petitioner, in fact, has suffered no compensable loss, because the summary judgment was entered in patent violation of the Treaty of Amity and the FSIA. *See* Mashayekhi v. Iran, Civ. Act. No. 79-2039 (D.D.C. June 10, 1981). Thus, the question of Fifth Amendment compensation, at best, only could be addressed on this appeal in connection with a subsequent decision of the lower court on the Government of Iran's and AEOI's original defenses of sovereign immunity and other arguments against the district court's entry of the unlawful order. It is not ripe for decision at this time.

slip op. at 34-38; *Chas. T. Main,* typescript op. at 23-24. In addition, the United States District Court for the Central District of California reached the same conclusion: "Any contention of loss is thus premature." *Security Pacific Nat'l Bank v. Government and State of Iran,* No. CV 79-4661 RJK (C.D. Cal. Apr. 30, 1981), typescript op. at 39, *appeal pending sub nom. Hoffman Export Corp. v. Government of Iran,* No. 81-5432 (9th Cir.).

The District of Columbia Circuit reasoned:

> We have no reason to believe that the arbitration panel will not render meaningful relief. We have no reason to believe that the $1 billion security fund will not cover all meritorious claims. We have no reason to believe that the Iranians will not replenish the fund as they have agreed to do. We have no reason to believe that if they do not replenish the fund, then the prevailing claimants will be unable to obtain worldwide enforcement of any award according to the terms of the declarations. Finally, and by no means of least importance, we have no assurance that the appellees' claims are meritorious, and thus that executive action has taken anything of value.

AIG, slip op. at 36;[41] *accord, Security Pacific Nat'l Bank,* typescript op. at 39. The First Circuit went further and stated:

> Not only is *Main's* claim for compensation, at this point, wholly speculative, it is . . . made before the

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[41] This reasoning is consistent with the Court's recent decision in Hodel v. Virginia Surface Mining & Recl. Ass'n, No. 79-1538 (U.S. June 15, 1981). Prior to its enforcement, appellees challenged the constitutionality of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§1201-1328 (Supp III. 1979) ("Surface Mining Act"), alleging, *inter alia,* that provisions of the Surface Mining Act effected an uncompensated taking of private property in violation of the Fifth Amendment. The court rejected appellees' contention:

> Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue

(footnote continues)

> wrong tribunal . . . . If and when *Main* can establish a "taking" for which compensation is due, its remedy will lie in the Court of Claims . . . .

Chas. T. Main, typescript op. at 24.[42]

In contrast, Judge Duffy apparently concluded that the "taking" issue was ripe for review and in *dicta* stated that the settlement of claims would be a compensable taking. *Marschalk,* typescript op. at 57-64. This result was premised on Judge Duffy's conclusion that the loss plaintiff suffered was its right to adjudicate its claims in United States courts and that, even if it prevailed before the Arbitral Tribunal, plaintiff would be able to recover no more than 20 cents on the dollar. Typescript op. at 62-63. First, the finding that claimants

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(footnote continued)

> properly before the District Court and, in turn, this Court, is whether the "mere enactment" of the Surface Mining Act constitutes a taking . . . .
>
> . . . .
>
> . . . [A]ppellees cannot at this juncture legitimately raise complaints in this Court about the manner in which the challenged provisions of the Act have been or will be applied in specific circumstances, or about their effect on particular coal mining operations. There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate original contour requirement of §515(d) or a waiver from the surface mining restrictions in §522(e). If appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the district court simply is not ripe for judicial resolution.

Hodel, slip op. at 29-31 (footnotes omitted). Since petitioner has not sought relief before the Arbitral Tribunal, the taking issue is not ripe for judicial resolution. *Accord,* Hodel v. Indiana, No. 80-231, slip. op. at 18-19 (U.S. June 15, 1981).

[42] The District of Columbia Circuit declined to rule on whether claimants would have a remedy in the Court of Claims, *AIG,* slip op. at 37; in *Marschalk* the court opined that a remedy would not lie in the Court of Claims. Typescript op. at 63.

prevailing before the Arbitral Tribunal will recover no more than 20 cents on the dollar is groundless. The Algerian Declarations explicitly provide that successful claimants will recover the full dollar amount of their awards. Further, the assumption that Iran will not replenish the fund to maintain the minimum balance of $500 million is also without foundation, especially given Iran's substantial efforts to date to establish the Arbitral Tribunal.

Second, to the extent claimants are entitled to have their claims adjudicated, no "right" exists to have these claims adjudicated in United States courts. Judge Duffy simply makes the assertion without authority. The reason for the omission is simple. This Court and other courts have recognized repeatedly that there is no "right" to resolve in the courts all disputes. *See, e.g., Morrissey v. Brewer,* 408 U.S. 471 (1972) (revocation of parole by administrative agency); *Goldberg v. Kelley,* 397 U.S. 254 (1970) (termination of welfare payments by administrative agency); *County-Wide Insurance Co. v. Harnett,* 426 F. Supp. 1030 (S.D.N.Y.), *aff'd mem.,* 431 U.S. 934 (1977) (upholding New York's "No-Fault" Insurance Law containing compulsory arbitration provision as reasonable alternative to judicial proceeding).

Under these circumstances Judge Duffy's supposition that the settlement of claims would be a taking must be rejected.

The case relied on primarily by other claimants in support of their arguments that the taking issue is ripe for determination is the *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). The *Regional Rail Reorganization Act Cases* presented unique questions concerning the validity of Congress's comprehensive plan to reorganize the railroad network in the Northeast. Plaintiffs (parties with interests in the reorganized Penn Central Railroad) attacked the constitutionality of the Regional Rail Reorganization Act on the ground that it was a taking of their property without just compensation. They argued, in particular, that the securities and other obligations they received were not equivalent to the rail properties whose transfer was compelled by the Act and that the law required continuation of rail operations that effectively eroded the Penn Central estate. The only issue that the Supreme Court found

"ripe for adjudication" was the "availability of the Tucker Act," not the probable success of plaintiffs' claims thereunder. 419 U.S. at 124-25, 136-37.

What the Supreme Court did not hold in the *Regional Rail Reorganization Act Cases* was that the plaintiffs actually had suffered a compensable loss and would therefore benefit from the "availability" of a Tucker Act remedy. "[W]hat constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978), and federal district and circuit courts ordinarily will not determine that "property" has been "taken" where the Court of Claims or another forum is available. *See Lenoir v. Porters Creek Watershed Dist.*, 586 F.2d 1081, 1087-88 (6th Cir. 1978); *Stringer v. United States*, 471 F.2d 381 (5th Cir. 1973); *cert. denied*, 412 U.S. 943 (1973); *Chevron Chem. Co. v. Costle*, 499 F. Supp. 732, 737, 742-43 (D. Del. 1980), *aff'd*, 641 F.2d 104 (3d Cir. 1981). The availability of the Tucker Act as a possible remedy (with the Court of Claims as the forum) and any entitlement to compensation are separate questions. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (constitutionality of the Price-Anderson Act upheld against a Fifth Amendment challenge, in part, on ground that remedy available in Court of Claims).

The District of Columbia Circuit in *AIG* rejected plaintiffs' reliance on the *Regional Rail Reorganization Act Cases*. The court determined the allegations that a taking had occurred in the suits before it here substantially more speculative than the allegations of a "conveyance taking" and an "erosion taking" in the *Regional Rail Reorganization Act Cases*. *AIG*, slip op. at 36.

The Government of Iran submits that the result reached in *AIG* is correct. Petitioner cannot demonstrate that it has suffered a taking. Accordingly, the issue of whether petitioner ultimately may be entitled to compensation is not ripe for review.

CONCLUSION

Based on the foregoing, this Court should uphold the actions the President has taken to implement the Algerian Declarations, affirm the district court's denial of the preliminary injunction[43], the dismissal of petitioner's complaint, and the consolidated *vacatur* of prejudgment attachments. This Court should also direct the lower court to give immediate effect to the *vacatur* of attachments, vacate the summary judgment, and prohibit all further judicial proceedings based on that judgment or on petitioner's claim.

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June 19, 1981

[43] The injunction pending appeal directed against respondents should expire by its terms once a ruling of this Court is issued.

No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

DAMES & MOORE, a partnership,
Petitioner,

v.

DONALD T. REGAN, the Secretary
of the Treasury of the United States
of America, and THE UNITED STATES OF AMERICA,
Respondents,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE ATOMIC ENERGY ORGANIZATION OF
THE ISLAMIC REPUBLIC OF IRAN,
and
BANK MARKAZI IRAN,
Intervenor-Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit Before Judgment

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IN THE

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OCTOBER TERM, 1980

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v.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit Before Judgment

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TABLE OF CONTENTS

	Page
I. THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT DOES NOT AUTHORIZE THE PRESIDENT PERMANENTLY TO DISPOSE OF FOREIGN ASSETS	3
A. IEEPA Does Not Give the President "Plenary Control" Over Frozen Assets	3
B. IEEPA's Provision for the Continuation of Freezing Controls in the Presence of Outstanding American Claims Does Not Authorize Presidential Orders Permanently Abrogating Existing Statutory Rights of Claimants	6
C. The "Transfer" Order Here Would Be Unlawful Under TWEA as an Evasion of the Statutory Protections Provided for American Creditors	8
II. THE PRESIDENT DOES NOT HAVE STATUTORY OR INHERENT CONSTITUTIONAL AUTHORITY TO NULLIFY PETITIONER'S RIGHTS	9
A. The President's Actions Conflict Directly With FSIA	9
B. The President's Action Is Not Supported By Historical Practice or Judicial Precedent	12
III. EVEN IF AUTHORIZED, THE PRESIDENT'S ACTION CONSTITUTES A TAKING OF PROPERTY WITHOUT JUST COMPENSATION	16
CONCLUSION	20

TABLE OF AUTHORITIES

Cases Page

Acton v. United States, 401 F.2d 896 (9th Cir. 1968), *cert. denied*, 395 U.S. 945 (1969) 17, 18
American Int'l Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir., May 22, 1981) 2, 17, 19
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 14
Becker Steel Co. v. Cummings, 296 U.S. 74 (1935).. 19
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 2
Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir., May 22, 1981) 17, 19
Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) 2
Cities Service Co. v. McGrath, 342 U.S. 308 (1952) 18-19
Clark v. Uebersee Finanz Korp., 332 U.S. 480 (1947) 3
Electronic Data Systems Corp., Iran v. Social Security Organization of the Government of Iran, No. CA3-79-218-F (N.D. Tex., June 7, 1981).... 1, 2
Ex Parte Peru, 318 U.S. 578 (1943) 9
Guessefeldt v. McGrath, 342 U.S. 308 (1952) 19
Kaiser Aetna v. United States, 444 U.S. 164 (1979) 18
Markham v. Cabell, 326 U.S. 404 (1945) 4
Marschalk Co. v. Iran National Airlines Corp., No. 79 Civ. 7035 (CBM) (S.D.N.Y., June 11, 1981).. 2, 18
National Airmotive Corp. v. Iran, 499 F. Supp. 401 (D.D.C. 1980) 2
Newport & Cincinnati Bridge Co. v. United States, 105 U.S. (15 Otto) 470 (1881) 18
Orvis v. Brownell, 345 U.S. 183 (1953) 5, 18-19
Ozanic v. United States, 188 F.2d 228 (2d Cir. 1951) 13
Propper v. Clark, 337 U.S. 472 (1949) 4
Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955) 15
Tagle v. Regan, 643 F.2d 1058 (5th Cir. 1981).... 3

TABLE OF AUTHORITIES—Continued

Page

United States v. Belmont, 301 U.S. 324 (1937) ...12, 13-15
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 12, 15
United States v. Ehrlichman, 376 F. Supp. 29 (D.D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) 15
United States v. Fuller, 409 U.S. 488 (1973) 17, 18
United States v. Guy W. Capps, Inc., 204 F.2d 665 (4th Cir. 1953), *aff'd on other grounds*, 344 U.S. 296 (1955) 15
United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) 2
United States v. Pink, 315 U.S. 203 (1942) 12, 13-15
Zittman v. McGrath, 341 U.S. 446 (1951) 5, 19

Constitutional Provisions, Statutes and Rules

U.S. Const., amend. V 16
Cal. Civ. Proc. Code § 674(a) 17
22 U.S.C. § 1732 16
Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, §§ 1602, *et seq.* ("FSIA") .....*passim*
Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) 14
International Claims Settlement Act, 22 U.S.C. §§ 1621, *et seq.* 13
International Emergency Economic Powers Act, 50 U.S.C. §§ 1702, *et seq.* ("IEEPA") .....*passim*
International Emergency Economic Powers Act, 50 U.S.C. § 1702(a) 4, 8
International Emergency Economic Powers Act, 50 U.S.C. § 1706(a) 6, 7, 8
Joint Resolution of August 4, 1939, 53 Stat. 1199.. 14
Trading With the Enemy Act, 50 U.S.C. App. § 5(b) ("TWEA") 3, 5
Trading With the Enemy Act, 50 U.S.C. App. § 9 8
Trading With the Enemy Act, 50 U.S.C. App. § 34 8

TABLE OF AUTHORITIES—Continued

Page

Executive Orders, Regulations and Executive Agreements

Declaration of the Government of the Democratic and Popular Republic of Algeria ..... *passim*
Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ..... *passim*
31 C.F.R. § 535.203(e) 17
31 C.F.R. § 535.504 17
25 Fed. Reg. 3458 (1959) 6
25 Fed. Reg. 7240 (1960) 6
28 Fed. Reg. 7935 (1963) 6
38 Fed. Reg. 7894-95 (1973) 6
45 Fed. Reg. 224 (1980) 6

International Agreements

Agreement Concerning the Settlement of Claims, May 11, 1979, United States-China, 30 U.S.T. 1957, T.I.A.S. No. 9306 ..... 6, 13, 14
Agreement Concerning the Settlement of Claims, May 19, 1979, United States-Egypt, T.I.A.S. No. 9589 14
Agreement Regarding Claims of United States Nationals, July 2, 1963, United States-Bulgaria, 14 U.S.T. 969, T.I.A.S. No. 5389 ..... 6, 13
Agreement Regarding Claims of United States Nationals, July 16, 1980, United States-Poland, 11 U.S.T. 1953, T.I.A.S. No. 4545 ..... 6, 13-14
Agreement Regarding Pecuniary Claims of the United States and its Nationals, July 19, 1948, United States-Yugoslavia, 62 Stat. 2658, T.I.A.S. No. 1803 ..... 6, 13-14
Agreement Regarding the Settlement of Claims, March 6, 1973, United States-Hungary, 24 U.S.T. 522, T.I.A.S. No. 7569 ..... 6, 13
Agreement Relating to Financial Questions, March 30, 1960, United States-Rumania, 11 U.S.T. 317, T.I.A.S. No. 4451 ..... 6, 13

TABLE OF AUTHORITIES—Continued

Page

Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853 16

Legislative Materials

Adjudication of Claims Against Vietnam: Hearing and Markup on H.R. 2200 Before the Subcomm. on Asian and Pacific Affairs and Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. (1979) 11

Amending the Trading With the Enemy Act: Hearing on H.R. 7738 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess. (1977) 7

Congressional Oversight of Executive Agreements —1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) 12, 15

Congressional Review of International Agreements: Hearing Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 94th Cong., 2d Sess. (1976) 12

Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations, 95th Cong., 1st Sess. (1977) 4, 7, 8

H.R. Rep. No. 770, 81st Cong., 1st Sess. (1949) 14

H.R. Rep. No. 865, 76th Cong., 1st Sess. (1939) 14

H.R. Rep. No. 95-459, 95th Cong., 1st Sess. (1977) .. 7

H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) .. 14

Immunities of Foreign States: Hearing on H.R. 3494 Before the Subcomm. on Claims and Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. (1973) 10

TABLE OF AUTHORITIES—Continued

Page

Iranian Asset Settlement: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. (1981) 9, 12

Revision of Trading With the Enemy Act: Mark-up Before the House Comm. on International Relations, 95th Cong., 1st Sess. (1977) 4, 7

Status of Claims Settlements With Nonmarket Countries: Hearings on East German Claims Bill H.R. 14642 Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 2d Sess. (1976) 11

Treatises and Commentaries

Carl, Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice, 33 Sw. L.J. 1009 (1979) 10

1 R. Lillich & B. Weston, International Claims: Their Settlement by Lump Sum Agreements (1975) 13

New York Times, Dec. 3, 1980 17

New York Times, Dec. 22, 1980 17

Restatement (Second) of Foreign Relations Law of the United States, § 144(1)(b) (1965) 15

von Mehren, The Foreign Sovereign Immunities Act of 1976, 17 Colum. J. Transnat'l L. 33 (1978) 11

Wall Street Journal, Nov. 3, 1980 17

14 M. Whiteman, Digest of International Law (1970) 15-16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership,
Petitioner,

v.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit Before Judgment

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REPLY BRIEF FOR PETITIONER

The issue in this case is whether the President can unilaterally terminate pending lawsuits, nullify attachments, liens and judgments of Article III courts, override an act of Congress, and permanently transfer property securing claims of United States creditors to the foreign debtor. The Government and other Respondents argue that the President has simply "settled Petitioner's claim by moving it from federal court to foreign arbitration."[1] This "settlement," the Government says, frees Petitioner "from the vagaries and hazards of domestic litigation against a foreign sovereign . . . ." Gov't Br. at 7. Petitioner has already overcome these

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[1] Respondents also contend that the President merely prescribed a new substantive rule of law that must be applied by domestic courts. This argument "begs the question of the power to prescribe such a new rule of law which has the undeniable effect of negating valid exercises of this Court's jurisdiction." *Electronic Data Systems Corp., Iran v. Social Security Organization of the Government of Iran*, No. CA3-79-218-F, slip op. at 22-23 (N.D. Tex., June 7, 1981).

purported "vagaries and hazards" in its Underlying Action, however, by obtaining prejudgment attachments and a final judgment against Iran and the AEOI.[2] No gloss by the Government can obscure the simple fact that Petitioner has been deprived of its otherwise enforceable statutory rights and judgment by the unauthorized action of the President.[3]

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[2] The Government and other Respondents also create a false picture of the record in this case by making unfounded assertions about Petitioner's Underlying Action, the merits of which are not properly before this Court. Thus, while conceding that Petitioner's case is typical (Gov't Br. at 3 n.2, 4 n.5), the Government obliquely questions Petitioner's judgment and prejudgment attachments in the Underlying Action. Gov't Br. at 26 n.19, 55 n.52. Similar collateral attacks are made by Intervenor Atomic Energy Organization of Iran ("AEOI") and Amicus Curiae 26 Iranian Banks. These attacks, containing several affirmative misrepresentations, are procedurally improper and wrong in any event. The Government raised no such factual questions below, but filed a motion to dismiss under Rule 12(b)(6); it and the other Respondents are precluded from raising here questions concerning the validity of the district court's orders. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515-16 (1972).

[3] Nothing cited by the Government or any other Respondent authorizes the President to nullify a judgment of an Article III court, but the Algerian Declarations purport to do just that: "the United States agrees . . . to nullify all attachments and judgments . . . ." Pet. App. 22. The President's action interferes with the constitutional authority of Congress to confer jurisdiction and of the Judiciary to adjudicate disputes. *See Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); *United States v. Klein*, 80 U.S. (13 Wall) 128 (1872). The lower courts have noted the serious "separation of powers problems raised by an Executive effort to affect the outcome of a pending case." *American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1891, slip op. at 35 (D.C. Cir., May 22, 1981); *National Airmotive Corp. v. Iran*, 499 F. Supp. 401, 405 n.8 (D.D.C. 1980); *see Electronic Data Systems Corp., Iran v. Social Security Organization of the Government of Iran*, No. CA3-79-218F (N.D. Tex., June 7, 1981); *Marschalk Co. v. Iran National Airlines Corp.*, 79 Civ. 7035 (CBM), slip op. at 56-57 (S.D.N.Y., June 11, 1981).

I. THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT DOES NOT AUTHORIZE THE PRESIDENT PERMANENTLY TO DISPOSE OF FOREIGN ASSETS.

Petitioner agrees with the Government that insofar as the President purports to nullify Petitioner's judgment and attachment liens and to order the "transfer" of attached property to Iran, the "issue is the extent and nature of the powers the President possesses under IEEPA . . . ." Gov't Br. at 21. Petitioner contends that the President's action, which orders the permanent disposition of the property and the evasion of statutory rights of American creditors, exceeds his authority under IEEPA. Pet. Br. at 27-31. The Government does not recognize any limitations on IEEPA's freeze authority and simply argues in a variety of ways that the "plain language" of Section 1702 authorizes the President to "compel" the "transfer" of foreign assets. That limitless reading of Section 1702's language transforms a statute enacted expressly to curb presidential power into one that drastically enlarges it.

A. IEEPA Does Not Give the President "Plenary Control" Over Frozen Assets.

The Government concedes IEEPA was enacted to restrict presidential control over foreign property by "deliberately with[holding] from the President" the authority to vest assets. Gov't Br. at 38. Under TWEA that vesting power was the sole source of presidential authority permanently to dispose of foreign property. 50 U.S.C. App. § 5(b). The authority IEEPA preserves —the power temporarily to freeze or block transactions in property—does not authorize a permanent disposition.[4] Congress clearly reaffirmed the distinction between the

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[4] Congress itself recognized the freeze power does not include the power to dispose permanently when it amended TWEA to add the vesting power. *See Clark v. Uebersee Finanz Korp.*, 332 U.S. 480, 487 (1947); *Tagle v. Regan*, 643 F.2d 1058, 1066 (5th Cir. 1981); Pet. Br. at 25 n.25.

prohibitory power to freeze and the affirmative power permanently to dispose by vesting when it adopted IEEPA.[5] The Government, however, simply refers to the "plain language" of IEEPA (Gov't Br. at 19), characterizes the President's authority as including the "disposition of foreign assets" (*id.* at 15, 30), and makes sweeping—and unsupported—assertions that the President's statutory control over foreign property is "plenary" (*id.* at 24, 35) and "complete" (*id.* at 30).[6]

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[5] For example, Congressman Solarz asked Congressman Bingham, the chairman of the subcommittee that reported the House version of IEEPA, to explain the extent of the President's power under IEEPA if, in response to a new Arab oil boycott, the President declared a national emergency:

> Mr. Solarz. . . . When [IEEPA] talks about regulating the controlling foreign assets, does that mean he could freeze the assets of the boycott of the country that established the embargo?
>
> Mr. Bingham. Correct, *freeze but not seize. There is a difference.*

(Emphasis added.) Revision of Trading with the Enemy Act: Markup Before the House Comm. on International Relations, 95th Cong., 1st Sess. 4 (1977) (*"IEEPA House Markup"*) (emphasis added). *See also Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economics Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 108 (1977) (*"IEEPA House Hearings"*) (Justice Department representative: authority "merely [to prohibit] any transfer without a license . . .").

The authorities relied on by the Government also show that the power conferred by § 1702(a) is limited to the freezing or "immobilization" of foreign assets. *Propper v. Clark*, 337 U.S. 472, 484 (1949); *Markham v. Cabell*, 326 U.S. 404, 409 (1945).

[6] The Government claims that under IEEPA, the President can "maintain the foreign assets at his disposal, unfettered to the degree he deems advisable, for use in negotiating a resolution of the national emergency that gave rise to the blocking order." Gov't Br. at 28. For example, under the Government's construction of IEEPA and the Iranian precedent here, the President could declare an emergency, freeze all property in the United States in which Israel and its nationals have "any interest," shield it from judicial processes and the right of all Americans also possessing an "inter-

The Government also contends that Petitioner's statutory right to attach Iranian property was subject to regulation under IEEPA. Gov't Br. at 31-36. *But see* Pet. Br. at 29-30 & n.29. Thus, the Government argues that under *Orvis* v. *Brownell*, 345 U.S. 189 (1953), and *Zittman* v. *McGrath*, 341 U.S. 446 (1951), Petitioner secured by its attachment liens against the frozen assets only Iran's "contingent" interest in the property: "Under the Iranian regulations, the transfer of or creation of a legally enforceable interest in frozen property pursuant to court order is treated in the same manner as a voluntary transfer by Iran . . . ." Gov't Br. at 35.

Petitioner vigorously disputes the Government's characterizations of its attachments as "contingent." *See* Section III *infra*. Even were the Government's contentions correct, however, they do not establish that the President's authority under IEEPA to freeze assets includes the authority to order their permanent disposition. In terms of *Orvis* and the Government's theory, the only "contingency" to which the Iran assets were subject under IEEPA was the duration of the freeze. Unlike assets frozen under TWEA and cases decided thereunder such as *Orvis*, Iran's interest was not subject to the additional contingency that the property might be vested and permanently disposed of "in the interests of and for the benefit of the United States." 50 U.S.C. App. § 5(b)(1). As the Government says, Petitioner secured by its liens all that Iran could voluntarily give away. Since IEEPA withdrew the President's former authority permanently to dispose of frozen property, he is not authorized to give the property back.

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est" in that property, and order it "transferred" to a Middle-Eastern Tribunal empowered to "arbitrate" Iraqi claims arising out of the recent destruction of Iraq's nuclear reactor.

B. IEEPA's Provision for the Continuation of Freezing Controls in the Presence of Outstanding American Claims Does Not Authorize Presidential Orders Permanently Abrogating Existing Statutory Rights of Claimants.

Remarkably, the Government contends that the President's permanent abrogation of the rights of American creditors finds support in IEEPA's provision "for continuation of freezing controls even after the termination of a national emergency where necessary because of outstanding claims." Gov't Br. at 29; *see* 50 U.S.C. § 1706 (a). In fact, however, Section 1706(a) adds yet further support to the historical understanding that the power to freeze is the power temporarily to immobilize and not the power to dispose—it characterizes the President's authority under Section 1702 as that of "*prohibit*[*ing*] *transactions* involving [foreign] property" and authorizes the "*continuation of such prohibition* . . . [if] necessary on account of claims involving such country or its nationals." [7]

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[7] 50 U.S.C. § 1706(a)(1), (2) (emphasis added). *See* note 5 *supra*. In none of the Executive settlement agreements involving countries whose assets were frozen including those cited by the Government (Gov't Br. at 46 n.39), did the President do any more than promise to unfreeze the blocked property. *See* Agreement Concerning the Settlement of Claims, May 11, 1979, United States-China, 30 U.S.T. 1957, T.I.A.S. No. 9306; Agreement Regarding the Settlement of Claims, March 6, 1973, United States-Hungary, 24 U.S.T. 522, T.I.A.S. No. 7569; Agreement Regarding Claims of United States Nationals, July 2, 1963, United States-Bulgaria, 14 U.S.T. 969, T.I.A.S. No. 5389; Agreement Regarding Claims of United States Nationals, July 16, 1960, United States-Poland, 11 U.S.T. 1953, T.I.A.S. No. 4545; Agreement Relating to Financial Questions, March 30, 1960, United States-Rumania, 11 U.S.T. 317, T.I.A.S. No. 4451; Agreement Regarding Pecuniary Claims of the United States and its Nationals, July 19, 1948, United States-Yugoslavia, 62 Stat. 2658, T.I.A.S. No. 1803. The President has never ordered those unfrozen assets to be "transferred" to the foreign government following "settlement." *See* 45 Fed. Reg. 224 (1980) (China); 38 Fed. Reg. 7894-95 (1973) (Hungary); 28 Fed. Reg. 7935 (1963) (Bulgaria); 25 Fed. Reg. 7240 (1960) (Poland); 25 Fed. Reg. 3458 (1959) (Rumania).

Moreover, the Government's reference to Section 1706 (a) is particularly inappropriate in the context of Petitioner's claims. Section 1706(a) was added principally so that the President could continue an asset freeze without making a new, potentially embarrassing, declaration of a national emergency and because the State and Justice Departments were concerned that under IEEPA's definition of "emergency" the President could not lawfully characterize the state of affairs with several of the countries whose assets were then frozen as an "emergency." *See, e.g., IEEPA House Hearings* at 182-83, 209-10. In these circumstances, the President could not, without Section 1706(a), continue the asset freeze, and as a result his bargaining power to negotiate the settlement of *expropriation* claims of United States citizens against foreign governments—for which recovery by the United States claimants, without Executive intervention, is still almost entirely unavailable under FSIA—would be severely compromised.[8]

In contrast, Petitioner's commercial claim is cognizable in the United States courts under FSIA, and there is no indication whatever in the statute or its legislative history that IEEPA's freezing controls were intended to be used to prejudice the existing rights of American claimants.[9] Ironically, the loss of Petitioner's attached assets under the presidential orders at issue is just what was feared would happen to creditors without effective

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[8] *See IEEPA House Hearings* at 217-18; H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 6 (1977) (*"IEEPA House Report"*); *Amending the Trading with the Enemy Act: Hearing on H.R. 7738 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. 6, 15-17 (1977) (*"IEEPA Senate Hearing"*); *IEEPA House Markup* at 6.

[9] "It is the intent of the committee by this section to enable the timely termination of states of emergency, and a return to government under normal law, without prejudicing the ability of U.S. citizens to recover claims against foreign countries."

IEEPA House Report at 17; *see IEEPA House Hearings* at 217-18.

judicial remedies if Section 1706(a) were not included in IEEPA. As the Treasury Department's representative testified, "loss of control of these [frozen] assets would deprive American claimants against these countries of the security afforded for their private claims by this collateral." *IEEPA House Hearings* at 108.

C. The "Transfer" Order Here Would Be Unlawful Under TWEA as an Evasion of the Statutory Protections Provided for American Creditors.

The Government apparently concedes that the President's freeze authority under IEEPA is no greater than his analogous authority under TWEA (Gov't Br. at 30-31) and that, when foreign property is vested by the President under TWEA, American creditors of the foreign debtor are *entitled* by statute to have their claims paid out of the assets or their proceeds (*id.* at 37-38). Nonetheless, the Government insists that a transfer order that circumvents the rights of American creditors would have been lawful under TWEA. The Government has cited *no* case or other authority, and Petitioner is aware of none, in which any President *ever* employed TWEA's freeze authority to "compel . . . any . . . transfer . . . of . . . any [foreign] property" in a way even remotely analogous to the "transfer" ordered here.[10] To do so, Petitioner submits, would be unlawful under TWEA as a permanent disposition of property in derogation of the statute's protections of the interests of American creditors. 50 U.S.C. App. §§ 9, 34. If, under TWEA, the President could not order a permanent transfer of assets

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[10] The language of Section 1702(a) can be spliced together in nearly 100 different ways, resulting in literal language that ostensibly grants virtually limitless presidential power. For example, under the construction advanced in support of the President's power here—"direct and compel . . . any . . . transfer . . . of . . . any property in which [Iran] . . . has any interest"—the President could order that title to a home owned by an American and subject to a mortgage from an Iranian bank be "transferred" anywhere, or to anyone, or, to pick another of section 1702(a)'s terms, simply "nullif[ied]."

[Footnote continued on page 9]

in derogation of the rights of American creditors, he certainly cannot do so under the lesser authority conferred by IEEPA.

II. THE PRESIDENT DOES NOT HAVE STATUTORY OR INHERENT CONSTITUTIONAL AUTHORITY TO NULLIFY PETITIONER'S RIGHTS.

A. The President's Actions Conflict Directly With FSIA.

The Government erroneously contends FSIA does not limit the Executive's alleged inherent authority to settle American citizens' commercial claims against foreign states. First, the Government attempts to separate Executive settlement of such claims from the doctrine of sovereign immunity. Gov't Br. at 63. In *Ex Parte Peru*, 318 U.S. 578 (1943), however, this Court recognized the direct link between the two. Enforcing the now abandoned absolute theory of sovereign immunity, the Court observed that the doctrine

> involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of foreign affairs by the President and by the Department of State . . . .

Id. at 587 (Stone, C.J.).[11]

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[10] [Continued]

Limiting the scope of IEEPA authority to the temporary control of foreign property does not render the "transfer" power meaningless. Under his freeze authority the President could, for example, order that blocked demand deposits be transferred to an interest-bearing account, *Iranian Asset Settlement: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 102-103 (1981), or safeguard frozen foreign property in the physical possession of foreign nationals or agents of the foreign government by ordering it transferred to the custody of another for the duration of the freeze.

[11] The Government's alleged distinction also ignores the stated purpose of FSIA to remove Executive control over commercial suits against foreign states. *See* Pet. Br. at 9-16. Moreover, if the

Second, the Government contends that the Executive's settlement power "does not expand or contract depending upon the availability of private remedies to individual claimants." Gov't Br. at 58. The Government's position is refuted by FSIA and its legislative history. Moreover, it is inconsistent with statements of Executive representatives during the House Committee Hearings on FSIA acknowledging Congress' authority to regulate in this field,[12] even to the complete exclusion of the Executive.[13]

Government were correct, FSIA—like the Tate letter—would become an "empty gesture," *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 45 (1973) (*"1973 House Comm. Hearings"*); commercial claims against foreign states would continue to be compromised by Executive intervention under the guise of a "settlement" rather than a suggestion of immunity.

[12] *1973 House Comm. Hearings* at 30 (testimony of Bruno Ristau, Chief, Foreign Litigation Unit, Civil Division, Department of Justice, responding to question on removal of FSIA claims: "[*W*]*e feel and we are convinced that the Congress has absolute authority to legislate in this area*" (emphasis added).) Intervenor Bank Markazi's quotation from the legislative history regarding Executive espousal of claims is taken out of context. Markazi Br. at 29-30. In context, Mr. Brower's statement simply acknowledged that if the new FSIA remedy proved inadequate, the State Department would remain willing to espouse a citizen's claim through diplomatic channels. *See 1973 House Comm. Hearings* at 23-26.

[13] *1973 House Comm. Hearings* at 30. (Mr. Ristau, responding to question concerning FSIA cases during periods of strained diplomatic relations, stated: "Ideally, Congressmen, it shouldn't have any impact, but rather a dispute arising out of a commercial activity ought to be divorced from any diplomatic overtones whatsoever *and should be settled through the ordinary processes of law*. A dispute between a painting contractor, to use your own example, and the Government *should in no way be affected by whatever the state of diplomatic relations at any given moment might be. It should be totally divorced*" (emphasis added).) *Cf.* Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L. J. 1009, 1063 (1979) ("Assume American hostages are being held by a foreign govern-

Finally, there is no merit to the Government's suggestion that contemporaneous or post-FSIA congressional action refutes Petitioner's contention that FSIA removed Executive authority over commercial claims. The Government cites three actual or contemplated settlements concerning expropriation or nationalization claims,[22] which pursuant to congressional authorization will be or have been adjudicated by the Foreign Claims Settlement Commission.[14] None of these supports the Government's contention that Congress, through the provision of mechanisms to satisfy long-outstanding expropriation claims, similarly intended that Petitioner's presently enforceable contract claim under FSIA would be subject to settlement by the Executive.[15]

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ment. While negotiating for their release, the United States Government wishes to offer as a quid pro quo the termination of pending litigation against that nation within this country. *Under the FSIA, the Exective would have no such authority*, similarly, the judiciary probably cannot dismiss the actions if the jurisdictional criteria of the Act [are] satisfied" (emphasis added).) *See also* von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Transnat'l L. 33, 65 (1978).

[14] (1) Claims against the German Democratic Republic (regarding nationalizations), *Status of Claims Settlements with Nonmarket Countries:Hearings on East German Claims Bill H.R. 14642 Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 2d Sess. 1, 38 (1976); (2) pre-settlement adjudication of claims against China for "nationalization, expropriation, intervention, or other taking of, or special measures directed against property" which process was completed by the Foreign Claims Settlement Commission in 1972, *id.* at 8, 9; and (3) pre-settlement adjudication of claims arising out of North Vietnam's nationalization and expropriation of U.S. nationals' property, *Adjudication of Claims Against Vietnam: Hearing and Markup on H.R. 2200 Before the Subcomm. on Asian and Pacific Affairs and Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 1, 2 (1979).

[15] In referring to the Congressional hearings on the Algerian Declarations, both the Government (Gov't Br. at 55) and Intervenor Bank Markazi (Markazi Br. at App. B-23 through B-25)

B. The President's Action Is Not Supported By Historical Practice or Judicial Precedent.

The Government, pointing to "a long-standing practice" (Gov't Br. at 41), asserts the President has broad, perhaps unlimited, inherent authority to settle citizens' claims against foreign states. It relies in large part on the propositions, drawn from pre-FSIA authorities, that

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take great solace from the fact that Congress has not directly expressed, in pending bills or legislation, its dissatisfaction with the Algerian Declarations. However, Congress, like the present Administration (Pet. Br. at 21 n.20), has expressed concern over the validity of the agreements and, quite properly, is awaiting the final judicial decision of this issue. *See Iranian Asset Settlement: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 3, 4 (1981).

The Government also cites two congressional hearings—*Congressional Oversight of Executive Agreements—1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) ("*Separation of Powers Hearings*") and *Congressional Review of International Agreements: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 2d Sess. (1976) ("*International Security Hearings*")—to convey the erroneous impression that Congress has fully acquiesced in Executive claims settlement agreements. If anything, these hearings, prompted by the secret aid agreement made between President Nixon and President Thieu, *see, e.g., International Security Hearings* at 96; *Separation of Powers Hearings* at 3, indicate serious concerns regarding the source and scope of the Executive's inherent constitutional authority to enter into Executive agreements on issues of major concern to the country.

For instance, during the hearings Congress and various scholars repeatedly questioned the scope of inherent Executive authority to enter into various agreements and the contention that such inherent power had been validated by *Pink, Belmont* and *Curtiss-Wright. See, e.g., International Security Hearings* at 38-39, 69-70, 73, 269. Apparently the Executive representatives attempted to placate congressional concerns regarding the use of Executive agreements by explaining that some 97-98% of all such agreements were entered into, not on the sole authority of the Executive, but rather pursuant to treaty or statutory directive or subject to subsequent congressional approval. *See, e.g., id.* at 170, 213; *Separation of Powers Hearings* at 306-07.

claims of United States citizens against foreign states are in essence claims of the United States which the Executive may dispose of as it chooses and that the Executive may make its settlement of claims the exclusive remedy of the claimant, extinguishing any recourse under domestic law which the claimant might otherwise have. That argument, however, arises out of the pre-FSIA reality that "[a]bsent a diplomatic initiative on the part of the private claimant's government, generally these claims have gone begging." I R. Lillich & B. Weston, *International Claims: Their Settlement by Lump Sum Agreements* 10 (1975). FSIA renders the Government's authorities irrelevant.

The Government also relies in large part on cases which involve Executive action in conjunction with congressional authorization—either by treaty or by act of Congress.[16] These cases have no bearing on the President's inherent authority to settle claims by Executive agreement. Finally, many of the Executive agreements the Government cites were not concluded pursuant to the President's inherent power to settle claims, but rather rest on at least implicit congressional authorization, pursuant to the statutory framework of the International Claims Settlement Act, 22 U.S.C. §§ 1621, *et seq.*[17]

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[16] Some of the Government's and Bank Markazi's cases do not involve the Executive's power to enter into international agreements at all. Of those that do, all but three involve a treaty, not an Executive agreement. Two of these exceptions, *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), are discussed in Petitioner's Brief at 19-20. The third, *Ozanic v. United States*, 188 F.2d 288 (2d Cir. 1951), involved an Executive agreement authorized by an act of Congress. The language in *Ozanic* relied on by the Government (Gov't Br. at 45) and Bank Markazi (Markazi Br. at 17, 25) is dicta.

[17] *See* Agreements with China, Hungary, Bulgaria, Poland and Rumania cited in full at note 7 *supra*. In addition, the Agreement Regarding Pecuniary Claims of the United States and its Nationals, July 19, 1948, United States-Yugoslavia, 62 Stat.

Petitioner is aware of no Executive agreement prior to 1977 that purports to affect pending claims in United States courts. The provisions of the two Executive agreements settling claims which have been concluded *after* the effective date of FSIA certainly do not.[18] Nor does the Litvinov Assignment—which Intervenor Bank Markazi claims is just like the agreement at issue in this case (Markazi Br. at 24)—advance the Government's argument. Not only was that agreement sanctioned by Congress,[19] it essentially waived claims of the Soviet Union against American nationals and assigned nationalized Soviet assets in the United States to the government to satisfy the claims of American nationals against the Soviet Union. *See United States v. Pink*, 315 U.S. 203, 225, 227-28 (1942). Indeed, in both *Pink*, *id.* at 226-27, and *United States v. Belmont*, 301 U.S. 324, 331-32 (1937), the Court noted it did not have before it any claims by United States citizens that their rights as creditors had been prejudiced by the Assignment. In *Pink*, the Court specifically stated that as far as it could

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2658, T.I.A.S. No. 1803, was explicitly recognized by the Act, and the Agreement Regarding Claims of United States Nationals, July 16, 1960, United States-Poland, 11 U.S.T. 1953, T.I.A.S. No. 4545, is anticipated in its legislative history. *See* H.R. Rep. No. 770, 81st Cong., 1st Sess.

[18] Agreement Concerning the Settlement of Claims, May 19, 1979, United States-Egypt, T.I.A.S. No. 9589; Agreement Concerning the Settlement of Claims, May 11, 1979, United States-China, 30 U.S.T. 1957, T.I.A.S. No. 9306. The China agreement settled expropriation claims that could not be successfully prosecuted in the United States in any event because of the act of state doctrine. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964). Moreover, under FSIA, relief for expropriation or nationalization claimants is tightly circumscribed. *See* FSIA Section 1605(a)(3); FSIA House Report, U.S. Code Cong. & Ad. News at 6618-19 & n.1.

[19] Joint Resolution of August 4, 1939, 53 Stat. 1199; H.R. Rep. No. 865, 76th Cong., 1st Sess. (1939); *see United States v. Pink*, 315 U.S. 203, 228 (1942).

determine from the record, U.S. citizen creditors had *not* been adversely affected, but rather had "been paid." 315 U.S. at 226-27.[20]

To uphold the President's action in this case, this Court would have to rule for the first time that the President has inherent authority, without congressional approval, to enter into Executive agreements which deprive United States citizens of rights expressly granted them by congressional statute. However, Executive agreements made without congressional sanction, not pursuant to a treaty or act of Congress, simply cannot supersede inconsistent provisions of prior acts of Congress. *United States v. Guy W. Capps, Inc.*, 204 F.2d 665, 659-60 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955); *Restatement (Second) of Foreign Relations Law of the United States*, § 144(1)(b) (1965); *see Seery v. United States*, 127 F. Supp. 601, 607 (Ct. Cl. 1955).

The Executive has previously so acknowledged.[21] In 1958, for example, the State Department determined

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[20] Bank Markazi erroneously argues that the distinction in *Pink* between U.S. and foreign creditors is "meaningless." (Markazi Br. at 24). As observed in *United States v. Ehrlichman*, 376 F. Supp. 29, 33 n.4 (D.D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977): "None of these cases [*Pink*, *Belmont* and *Curtiss-Wright*] purport to deal with the constitutional right of American citizens or with presidential action in defiance of congressional legislation. When such issues have arisen, Executive assertions of inherent authority have been soundly rejected." (Citations omitted.)

[21] *See* 14 M. Whiteman, *Digest of International Law* 207 (1970) (Acting State Department Legal Advisor: "[w]hile the line of demarcation is not always wholly clear, legislation is necessary where the United States is required under the [Executive] agreement to take actions not consistent with existing statutes"); *Separation of Powers Hearings*, *supra* note 15, at 307.

that the President did not have the power to enter into an Executive agreement with Norway "which would in effect take jurisdiction of [a claim of Christopher Hannevig against the United States] from the Court of Claims and place it in an international arbitral tribunal." 14 M. Whiteman, *Digest of International Law* 248 (1970). The claim had been referred to the Court of Claims pursuant to a convention ratified by the Senate and by a joint congressional resolution. The State Department concluded the President did not have the power to submit the claim to international arbitration without congressional approval. *Id.* at 250.[22]

III. EVEN IF AUTHORIZED, THE PRESIDENT'S ACTION CONSTITUTES A TAKING OF PROPERTY WITHOUT JUST COMPENTATION.

The Government contends that Petitioner's attachments are not compensable property interests for Fifth Amendment purposes because they "were obtained as a result of a license that was expressly made revocable at any

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[22] In a futile search for *statutory* authority to settle claims, the Government continues to misread both IEEPA and 22 U.S.C. § 1732 (Gov't Br. at 52-53), neither of which can fairly be read to support the Government. *See* Pet. Br. at 17 n.17. Also, the Government now adds to its list the Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853. While the Treaty does indeed provide for resolution of the "interpretation or application" of the Treaty by "pacific" means, the underlying claim here is a breach of contract action—it does not involve an interpretation or application of the Treaty, and presidential authority to find a pacific settlement does not arise. Further, the Treaty itself clearly contemplates under Article XI(4) that creditors will bring such contract suits by providing that neither party shall enjoy immunity from "suit" over business activities, and under Article IV(1) that "lawful contract rights are afforded effective means of enforcement, in conformity with the applicable laws."

time." Gov't Br. at 64.[23] However, the Treasury Regulations issued to freeze Iranian assets in November 1979 (the "Freeze Regulations") purported to make revocable only the authorizations to obtain new attachments, not attachments acquired pursuant to that revocable authorization. *See* Pet. Br. at 36-40.[24] The Government cites no authority for the principle that confiscation of property interests obtained under a revocable license can be achieved without paying just compensation. Cases such as *United States v. Fuller*, 409 U.S. 488 (1973), and *Acton v. United States*, 401 F.2d 896 (9th Cir. 1968), *cert. denied*, 395 U.S. 945 (1969), hold no more than that withdrawal of the revocable license itself does not constitute a taking.

Further, as the District Court for the Southern District of New York explicitly recognized, those who obtained attachments pursuant to the Government's authorization believed they were acquiring valuable interests and that

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[23] As to the taking of Petitioner's judgment, the Government simply—but erroneously—asserts it was improperly entered. Gov't Br. at 55, 64-66. The relevant regulations merely prohibit the entry of a judgment "with respect to any property in which . . . there existed an interest of Iran." 31 C.F.R. §§ 535.203(e), 535.504. Petitioner has no such judgment. Its judgment adjudicated questions related to liability, liquidated the amount of Petitioner's claims and provided a basis for any future attempt to levy on Iranian assets; it did not create an interest in any property under California law. Cal. Civ. Proc. Code § 674(a). This construction of the regulations is consistent with the language of IEEPA. *See American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779, slip op. at 27-28 n.15 (D.C. Cir., May 22, 1981); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, No. 80-1027, slip op. at 14-14A n.13 (1st Cir., May 22, 1981).

[24] Prior to the Algerian Declarations, the government itself acknowledged that the attachments had ongoing validity by repeatedly indicating that the legal problems arising from attachments by United States creditors might impede returning the assets to Iran in exchange for the hostages. *See* N.Y. Times, Dec. 22, 1980, at A-1, A-13, col. 1; *id.*, Nov. 3, 1980, at A-1, A-15, col. 2; Wall St. J., Nov. 3, 1980, at A-3, col. 2.

"by relying on the government's action, [they] would not thereafter have [their] rights to the attachment nullified by another government action." *Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM), slip op. at 81 (S.D.N.Y., June 11, 1981). Expectations so engendered are relevant to whether property rights exist and have been taken unconstitutionally, *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979), and distinguish the cases relied on by the Government. Unlike the situation in *Orvis v. Brownell*, 345 U.S. 183, 187 (1953), it was not "apparent on its face" in 1979 that the attachments of American creditors were something less than protected property interests. Similarly, *United States v. Fuller*, 409 U.S. at 489, *Newport & Cincinnati Bridge Co. v. United States*, 105 U.S. (15 Otto) 470, 482 (1881), and *Acton v. United States*, 401 F.2d at 899, are all predicated on the foreseeability and voluntary acceptance of the risk of loss caused by future government actions.

The Government also contends that Petitioner's attachments have not been "taken" because they were merely "conditional" attachments, subject at all times to the President's "paramount and previously acquired power to direct the transfer of the property pursuant to IEEPA." Gov't Br. at 64. For this theory of conditional attachments to be correct, however, IEEPA would have to be interpreted not only to authorize the President to transfer Iranian assets, but also to empower the President to transfer them without payment of compensation to those whose rights have been impaired. This interpretation of IEEPA would ignore this Court's consistent view that the power granted the Executive by Congress to block and appropriate non-enemy property interests would be of doubtful constitutionality if the grant of power was not interpreted to provide for the payment of just compensation for property taken. *See Cities Service Co. v. McGrath*, 342 U.S.

330 (1952); *Guessefeldt v. McGrath*, 342 U.S. 308, 317-18 (1952); *Becker Steel Co. v. Cummings*, 296 U.S. 74, 79-80 (1935).

Moreover, the government explicitly authorized unconditional attachments of Iranian assets in the Freeze Regulations. The government never suggested that such attachments were somehow conditioned on the President's alleged plenary power to transfer the assets; thus the government is now estopped from denying the interests its own regulatory scheme created. *See Zittman v McGrath*, 341 U.S. 446, 452-53 (1951).[25]

The taking of Petitioner's attachments, judgment and judgment liens is plainly ripe for decision.[26] *See Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir., May 22, 1981); *American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779 (D.C. Cir., May 22, 1981). There can be no doubt that the taking of these property interests has already occurred.

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[25] Even assuming that Petitioner's liens were "contingent" on the President's alleged transfer power, these liens are valuable property rights. But for the President's actions, Petitioner would have the opportunity to enforce the liens against attached assets that (1) do not leave the United States (*e.g.*, physically immovable assets such as houses (*see* App. 19-20)); (2) return to the United States; or (3) move to a foreign jurisdiction that would recognize the liens. Even *Zittman* and *Orvis* recognize that a creditor's attachment lien is good as against the debtor's interest in the property attached. *Zittman v. McGrath*, 341 U.S. 446, 455-63 (1951); *Orvis v. Brownell*, 345 U.S. 183, 186 (1953).

[26] As to Petitioner's *claims*, the Government argues there could be no "taking" whether or not the claims are found to be within the jurisdiction of the Arbitral Tribunal. Gov't Br. at 65. Both the First Circuit and the D.C. Circuit correctly rejected this view. *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, slip op. at 23; *American Int'l Group, Inc. v. Islamic Republic of Iran*, slip op. at 40.

CONCLUSION

For the reasons stated, the Order of the District Court should be reversed.

Dated: June 23, 1981.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, A PARTNERSHIP, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS

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TABLE OF AUTHORITIES

Page

Cases:

Alfred Dunhill of London, Inc. v. *Cuba*, 425 U.S. 682 4

American Bell Int'l, Inc. v. *Islamic Republic of Iran*, No. 80-321 (D.D.C. June 11, 1981), cert. before judgment denied, No. 80-2111 (June 22, 1981) 2

American Int'l Group, Inc. v. *Islamic Republic of Iran*, Nos. 80-1779, 80-1891 (D.C. Cir. June 5, 1981) 4, 11, 12

Aris Gloves, Inc. v. *United States*, 420 F. 2d 1386 13-14

Blagge v. *Balch*, 162 U.S. 439 14

Chas. T. Main Int'l, Inc. v. *Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981) 3, 6, 12

DeHaro v. *United States*, 72 U.S. (5 Wall.) 599 7

Gray v. *United States*, 21 Ct. Cl. 340 ..... 13, 14

Great Western Insurance Co. v. *United States*, 19 Ct. Cl. 206, aff'd on other grounds, 112 U.S. 193 13

Heckman v. *United States*, 224 U.S. 413 4

Hodel v. *Virginia Surface Mining & Reclamation Association*, Nos. 79-1538, 79-1596 (June 15, 1981) 15

Markham v. *Cabell*, 326 U.S. 404 ..... 10, 11

Page

Cases—Continued:

Propper v. *Clark*, 337 U.S. 472 7

Regional Rail Reorganization Act Cases, 419 U.S. 102 13

Reiter v. *Sonotone Corp.*, 442 U.S. 330 7

United States v. *Fuller*, 409 U.S. 488 15

United States v. *Sioux Nation of Indians*, No. 79-639 (June 30, 1980) 14

United States v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 13

Constitution, treaties, statutes and rules:

United States Constitution, Fifth Amendment, Just Compensation Clause 13

Convention on Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 15

Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853 2

United States-Bulgaria Claims Settlement, July 2, 1963, Art. I(1)(c), 14 U.S.T. 969, T.I.A.S. No. 5387 4

United States-Hungary Claims Settlement, Mar. 6, 1973, Art. 2(2), 24 U.S.T. 522, T.I.A.S. No. 7569 4

United States-Rumania Claims Settlement, Mar. 30, 1960, Art. I(1)(c), 11 U.S.T. 317, T.I.A.S. No. 4451 4

Page

Constitution, treaties, statutes and rules—Continued:

Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602 *et seq.* 3

28 U.S.C. 1604-1607 3
28 U.S.C. 1605(a)(1) 6
28 U.S.C. 1605(a)(3) 5

Hostage Act, 22 U.S.C. 1732 2

International Emergency Economic Powers Act, (IEEPA), 50 U.S.C. (Supp. III) 1701 *et seq.* ... 1

50 U.S.C. (Supp. III) 1701(a) 6
50 U.S.C. (Supp. III) 1702(a)(1)(B) 8

Trading with the Enemy Act (TWEA), 50 U.S.C. app. 1 *et seq.* :

Section 9, 50 U.S.C. app. 9 10
Section 34, 50 U.S.C. app. 34 10

28 U.S.C. 1330(a) 3

Fed. R. Civ. P.:

Rule 8(c) 3
Rule 12(b)(6) 4

Miscellaneous:

31 C.F.R. (1980):

Section 535.203(e) 7
Section 535.418 7
Section 535.504 7
Section 535.805 7

Page

Miscellaneous—Continued:

Executive Orders:

No. 12279, 46 Fed. Reg. 7919 (1981) 9

No. 12280, 46 Fed. Reg. 7921 (1981) 9

No. 12281, 46 Fed. Reg. 7923 (1981) 9

No. 12294, 46 Fed. Reg. 14111 (Feb. 26, 1981) 11

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976) 3, 4, 5

H.R. Rep. No. 95-459, 95th Cong., 1st Sess. (1977) 8, 9

Iranian Asset Settlement: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs, 97th Cong., 1st Sess. (1981) 12, 13

McLaughlin & Teclaff, *The Iranian Hostage Agreements: A Legal Analysis,* 4 Fordham Int'l L.J. 223 (1981) 8, 10

Restatement (Second) of Foreign Relations Law (1965):

§ 69 5
§ 212 5
§ 213 5

S. Rep. No. 94-1310, 94th Cong., 2d Sess. (1976) 3, 5

S. Rep. No. 95-466, 95th Cong., 1st Sess. (1977) 10

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2078

DAMES & MOORE, A PARTNERSHIP, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS

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1. Petitioner challenges two distinct actions by the President in this case: (1) the ordering of the transfer of Iranian assets subject to the jurisdiction of the United States, and (2) the provision for the settlement of claims against Iran by means of their presentation to the Iran-United States Claims Tribunal. Although both of these measures were taken in connection with the Agreement with Iran, they implicate quite different powers of the President.

As we explain in our opening brief (Govt. Br. 28-29), the President had the power under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. (Supp. III) 1701 *et seq.*, to direct the return of frozen Iranian property to Iran solely in order to obtain the release of the

hostages and resolve the crisis with Iran, without making any provision for settlement of the claims of United States nationals. Thus, the validity of the Presidential order to transfer assets which are subject to judicial orders obtained by petitioner does not depend on whether petitioner's claim against the Iranian defendants is subject to the jurisdiction of the Claims Tribunal and is thereby settled by the Agreement. See, *e.g.*, *American Bell Int'l, Inc.* v. *Islamic Republic of Iran*, No. 80-321 (D.D.C. June 11, 1981), cert. before judgment denied, No. 80-2111 (June 22, 1981). Nor does it depend on whether the President even had authority to settle claims of any American nationals. Conversely, the President's power under the Constitution, the Hostage Act (22 U.S.C. 1732), and the 1955 Treaty with Iran,[1] to provide for the settlement and discharge of the claims of American nationals against Iran through submission to arbitration does not depend on whether he also has the authority under IEEPA to direct the transfer of blocked Iranian property, up to $1 billion of which will be deposited in a security account to fund awards by the Tribunal in favor of American claimants.

2. Petitioner concedes (Pet. Br. 18) that the President has authority to settle the claims of United States nationals against a foreign government. See Govt. Br. 40-50. The entire burden of its argument on the claims settlement issue (see Pet. Br. 9-18, 20-21) is that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602 *et seq.*, implicitly carves out an exception to this broad authority in the case of claims for which that Act permits a suit against the foreign government. For the reasons given in our opening brief (Govt. Br. 56-63), however, the FSIA is wholly irrelevant to the claims settlement issue.

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[1]Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853.

The pertinent provisions of that Act (28 U.S.C. 1604-1607) deal solely with issues of immunity (H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 20 (1976); S. Rep. No. 94-1310, 94th Cong., 2d Sess. 19 (1976); see also *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981), at 20) and confer jurisdiction on the district courts of in personam actions against a foreign sovereign whenever the sovereign is not entitled to immunity (28 U.S.C. 1330(a)).[2] The settlement by the Executive of a claim on which a claimant has filed suit against a foreign government no more interferes with the *jurisdiction* of the court or confers an *immunity* to that jurisdiction—the subjects addressed by the FSIA—than would a settlement entered into by the claimant himself. For example, if petitioner entered into an out-of-court agreement with the Iranian defendants settling its claims, that settlement would furnish a basis for the Iranian defendants to assert the affirmative defense of accord and satisfaction (Fed. R. Civ. P. 8(c)), not a lack of subject matter jurisdiction under 28 U.S.C. 1330(a) because of an immunity to suit. By the same token, if the President settles the claim pursuant to his constitutional or other authority, the Iranian defendants presumably could assert a similar defense (cf. *Heckman* v. *United States*, 224 U.S. 413, 444-446 (1912)) or one based upon the failure to state a claim upon which relief could be granted (Fed. R. Civ. P. 12(b)(6); *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, Nos. 80-1779, 80-1891 (D.C. Cir. June 5, 1981), slip op. 23); they could not, however, obtain a dismissal for lack of jurisdiction because of a supposed immunity to the jurisdiction of the courts.

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[2]The legislative history of the FSIA cited by petitioner (Pet. Br. 10-15) refers exclusively to the issue of a foreign government's immunity to suit and the State Department's previous role in making "suggestions of immunity" to the courts (*id.* at 12 & n.10). Petitioner still has cited no reference suggesting a congressional intent in the FSIA to abrogate the established practice of Executive claims settlement.

Moreover, as relevant here, the FSIA did not represent a break with the past with respect to foreign sovereign immunity; it merely codified the previously extant restrictive theory of sovereign immunity under which a foreign government is generally subject to suit for its commercial and other private acts. See H.R. Rep. No. 94-1487, *supra*, at 7. That theory of sovereign immunity had been adopted by the State Department itself in 1952. See *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 698-699, 711-715 (1976). Yet since 1952, as the District of Columbia Circuit observed, the Executive has entered into at least ten lump sum settlement agreements with other nations.. *American Int'l Group, Inc.* v. *Islamic Republic of Iran, supra*, slip op. 30. Significantly, three of those agreements settled commercial contract claims, on which the foreign government may not have been immune to suit in this country. See United States-Hungary Claims Settlement, Mar. 6, 1973, Art. 2(2), 24 U.S.T. 552, T.I.A.S. No. 7569; United States-Bulgaria Claims Settlement, July 2, 1963, Art. I(1)(c), 14 U.S.T. 969, T.I.A.S. No. 5378; United States-Rumania Claims Settlement, Mar. 30, 1960, Art. I(1)(c), 11 U.S.T. 317, T.I.A.S. No. 4451. If these settlements of commercial contract claims were not inconsistent with the restrictive theory of sovereign immunity adopted by the State Department in 1952, there is no reason to believe that Executive settlement of commercial claims became inconsistent with that same theory when it was codified in the FSIA. Similarly, the *Restatement*, which incorporates the restrictive theory of sovereign immunity with respect to commercial activities (*Restatement (Second) of Foreign Relations Law* § 69 (1965)), explicitly notes that the Department of State will espouse and settle contract claims in appropriate circumstances even without the claimant's consent (*id.* at § 212 Reporters' Note, § 213. The drafters of the *Restatement* therefore apparently saw no inconsistency between the proposition that foreign governments are subject to suit

on claims arising out of their commercial activities and the proposition that the President may settle the same claims. Accordingly, there is no reason to believe that Congress perceived such an inconsistency when it enacted the FSIA.[3]

Finally, the FSIA subjects a foreign sovereign to suit on more than commercial contract claims. For example, 28 U.S.C. 1605(a)(3) provides that a foreign sovereign is not immune from suit in the United States on certain expropriation claims.[4] Expropriation claims have frequently been the subject of claims settlement agreements. Yet under petitioner's argument that claims may not be settled by the Executive where they are (or perhaps may be) the subject of a suit filed under the FSIA, the Executive would be required to exclude certain expropriation claims from claims settlement agreements as well. See also 28 U.S.C. 1605(a)(1) (permitting suits where the foreign government has waived immunity). As we noted in our opening brief (Govt. Br. 59 n.55), such an approach would pose an insurmountable barrier to claims settlement by the Executive, which would not be in a position to make the complex legal and factual

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[3]The congressional reports on the FSIA also reflect an intent to ensure that the practice in the United States with respect to immunity is in line with that in other nations. H.R. Rep. No. 94-1487, *supra*, at 7; S. Rep. No. 94-1310, *supra*, at 7. The statutory purpose of bringing the United States into line with the international community would not be served by a construction of the FSIA that would disable the United States government from settling the claims of its nationals through negotiations with another nation, especially in circumstances as compelling as the Iranian crisis.

[4]28 U.S.C. 1605(a)(3) provides that a foreign state shall not be immune in any case in which rights in property taken in violation of international law are in issue and that property (or property exchanged for it) is present in the United States in connection with commercial activity or that property is owned or operated by an instrumentality of the foreign state that is engaged in commercial activity in the United States.

judgments necessary to determine whether each of a multitude of claims was one for which a suit would lie under the FSIA and which was therefore not subject to settlement between nations.

3. Petitioner contends (Pet. Br. 23-33) that IEEPA does not authorize the President to provide for the transfer of blocked Iranian assets to Iran and to the security account intended to fund awards by the Claims Tribunal. In petitioner's view, the power to allow foreign assets to leave the country is an "awesome" one (Pet. Br. 24) that defeats the rights of American creditors.

The language of IEEPA is indeed "sweeping and unqualified" (*Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority, supra,* at 9) with respect to the powers the President may exercise over blocked assets of a foreign country. But the legal principle that explains how those powers may affect petitioner and other claimants who obtained orders of attachment against Iranian property after the President's November 14, 1979, blocking order is quite simple. By issuing the blocking order, the President obtained, in effect, a congressionally authorized "lien" or right in those assets in order to enable him to deal with the "unusual and extraordinary threat * * * to the national security, foreign policy, or economy of the United States" (50 U.S.C. (Supp. III) 1701(a)) that was created by the hostage crisis. Petitioner and other individual claimants who obtained orders of attachment against that property after November 14, 1979, were thereby rendered, in effect, junior creditors whose interest in Iranian property was necessarily subordinate to and contingent upon the exercise of the President's prior and paramount authority to control the property in the national interest and for the benefit of claimants generally, rather than for the benefit of the relatively few individual claimants who happened to have filed suit and obtained attachments. Petitioner therefore cannot

complain of the President's exercise of the very powers Congress conferred on him.

Petitioner was on notice of the contingent and subordinate nature of its interest when it filed suit, by virtue of regulations providing that "any attachment * * * is null and void" with respect to Iranian property "[u]nless licensed or authorized" under the regulations (31 C.F.R. 535.203(e) (1980)) and making clear that the general license for pre-judgment attachments and other proceedings (31 C.F.R. 535.418, 535.504 (1980)) "may be * * * revoked at any time" (31 C.F.R. 535.805 (1980)). When that general license for pre-judgment attachments was revoked, the legal basis for the attachments was eliminated and the attachments were rendered "null and void."[5] Moreover, as we explain in our opening brief (Govt. Br. 28-38), past decisions of this Court make clear that a pre-judgment attachment of frozen assets in a suit against the foreign debtor does not restrict the President in his control over the property in any event.

In petitioner's view, however, IEEPA does not allow the President "permanently to dispose" of foreign property out

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[5]Petitioner argues (Pet. Br. 37-40) that these regulations meant only that no *new* attachments could be obtained after the license was revoked, but that attachments that were obtained while the license was in effect would remain valid. Such an interpretation is inconsistent with the very concept of a license, which ordinarily allows the use of property only at the sufferance of the licensor, without creating any vested interest in the property that survives the revocation of the privilege. Cf. *De Haro* v. *United States*, 72 U.S. (5 Wall.) 599, 627 (1867). Because a license by definition may be revoked at any time, petitioner's construction renders the explicit revocability provision redundant. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). Furthermore, petitioner's interpretation is entirely inconsistent with the purpose of the assets control regulations, which is to leave control of the assets by the President unfettered by the creation of interests in property, by court order or otherwise. See *Propper* v. *Clark*, 337 U.S. 472 (1949).

of the country (Pet. Br. 28).[6] This argument is answered by the very language of IEEPA itself. The statute authorizes the President to "regulate" or "direct and compel" the "transfer, withdrawal, transportation, * * * or exportation of * * * any property in which [a] foreign country * * * has any interest * * * by any person, or with respect to any property, subject to the jurisdiction of the United States" (50 U.S.C. (Supp. III) 1702(a)(1)(B)). This language plainly authorizes the President to license a foreign country to "withdraw" or "export" the property it has in the United States or, as here, to bring about the same result by "directing" and "compelling" "any person" in possession of Iranian property to "transfer," "transport," and "export" it so that it will be placed in the security account or in the custody and control of Iran, the country to which it belongs. See McLaughlin & Teclaff, *The Iranian Hostage Agreements: A Legal Analysis*, 4 Fordham Int'l L.J. 223, 235 (1981).

Petitioner has pointed to nothing in IEEPA or its legislative history to suggest that Congress did not intend these words to mean exactly what they say. To the contrary, the House Report emphasizes that the power granted in IEEPA is "sufficiently broad and flexible to enable the President to respond as appropriate and necessary to unforeseen contingencies" (H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 10 (1977)). Here, the President determined that the transfers of Iranian property contemplated by the Agreement with Iran

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[6]Petitioner argues (Pet. Br. 27-28) that this supposed "permanent" disposition of the assets conflicts with IEEPA's purpose of allowing only temporary freezing of foreign assets. But petitioner loses sight of the fact that the President's withholding of the assets from *Iran*, the owner of the property, *was* temporary in nature, lasting only so long as necessary to accomplish the objectives of the blocking order.

were an "appropriate and necessary" response to the "unforeseen contingencies" of the crisis following the seizure of the American hostages, because they implemented the Agreement providing for the release of the hostages and resolution of claims of United States nationals and prepared the way "to begin the process of normalization of relations between the United States and Iran" (Executive Order Nos. 12279, 12280, 12281 (46 Fed. Reg. 7919, 7921, 7923 (1981)); Pet. App. 43, 46, 49).

Petitioner takes a narrower view of the statute's purposes, however, contending that the President cannot dispose of the assets in a way that affects its attachments and, therefore, its ability to recover on its claim in district court. It is true that the blocking powers authorized by IEEPA were intended in part to protect American claimants. See Govt. Br. 29-30. But Congress expected that this would be accomplished by the *President*, through a lump sum or other form of *settlement* of claims generally. See, *e.g.*, H.R. Rep. No. 95-459, *supra*, at 17. IEEPA was not intended to be a mere supplement to whatever powers of attachment individual claimants might have obtained in United States courts, as petitioner would have it.

If attachments obtained by claimants in the United States were held to prevent the President from transferring or freeing up blocked assets, they would prevent the President from resolving the crisis that first led to the blocking order, as IEEPA obviously contemplates. In the particular circumstances of this case, such judicial restraints would prevent the transfer of the $1 billion in bank-held assets that are to be placed in the security account to pay awards by the Claims Tribunal. And if the remainder of Iranian assets that are subject to attachment could not be returned to Iran in accordance with the terms of the Agreement, there is every likelihood that Iran would not make any additional payments into the security account to fund awards by the

Tribunal. In that event, the mechanism established by the President for the settlement of claims of United States nationals generally would be rendered ineffective. Such a result, reached for the benefit of those relatively few claimants who obtained pre-judgment attachments,[7] would plainly conflict with the clear congressional purpose in enacting IEEPA that nothing in the Act was intended "to impede the *settlement* of claims of U.S. citizens against foreign countries" (S. Rep. No. 95-466, 95th Cong., 1st Sess. 6 (1977); emphasis added).[8]

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[7]The passages in the IEEPA hearing and markup transcripts cited by petitioner (Pet. Br. 26 n.27) do not support its assertion that Congress intended to permit the President to freeze assets and negotiate a settlement *only* where the claimants could not sue the foreign government in United States courts.

[8]We have answered petitioner's argument (Pet. Br. 25-27) that, by virtue of Sections 9 and 34 of the Trading with the Enemy Act (TWEA), 50 U.S.C. app. 9 and 34, the President would have been prohibited under the TWEA from transferring frozen assets overseas rather than satisfying the claims of particular American claimants. See Govt. Br. 36-38. Those sections provided a right for claimants to recover only out of assets that were vested in the federal government—*i.e.*, foreign assets to which the United States had taken *title*. There is no comparable right under the TWEA to recover out of assets that were only frozen or blocked, as is the case with Iranian assets. See *Markham* v. *Cabell*, 326 U.S. 404, 409-410 (1945). Congress declined to permit the President to *vest* foreign assets under IEEPA. This omission obviously was not meant to assist American claimants, because they are thereby deprived of the benefits of Sections 9 and 34; the omission was instead intended for the protection of the foreign property owner whose property might be taken over by the federal government. Thus, the deletion of the vesting power cuts strongly against recognizing a right in petitioner, through its post-blocking attachments, to prevent the disposition of foreign assets in the manner agreed to by their owner. See McLaughlin & Teclaff, *supra*, 4 Fordham Int'l L.J. at 236.

4.a. Petitioner contends (Pet. Br. 33-43) that the President's Executive Orders requiring the transfer of property notwithstanding the orders of attachment and other judicial orders petitioner obtained constitute a taking of property without just compensation and should, for that reason, be enjoined. But these attachments were acquired pursuant to a license that was expressly made revocable at any time, and all such judicial orders were in any event subordinate to the President's previously invoked power to direct the transfer of assets pursuant to IEEPA. See Govt. Br. 36 n.29, 64; *Markham* v. *Cabell, supra*; see also note 5, *supra*. Thus, petitioner had no property interest resulting from these judicial orders that could be asserted against the federal government, and the President's directing the transfer of the property therefore does not constitute a taking of property requiring the payment of just compensation.[9]

b. Petitioner concedes (Pet. Br. 34 n.32) that any taking argument with respect to the President's exercise of his distinct power to settle claims of United States nationals "may not yet be ripe for review" because it has not yet presented its claim to the Tribunal and therefore does not know how that claim will be received by the Tribunal.[10] See

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[9]Petitioner also contends (Pet. Br. 34, 36) that it is entitled to just compensation because the President has "nullified" the judgment petitioner obtained against the Government of Iran and AEOI. However, Executive Order No. 12294 (46 Fed. Reg. 14111 (Feb. 26, 1981)) does not purport to "nullify" petitioner's judgment; that order merely *suspends* the domestic effect of claims that may be submitted to the Claims Tribunal. Cf. *American Int'l Group, Inc.* v. *Islamic Republic of Iran, supra*, slip op 32-34. See also Govt. Br. 55-56 & n.52.

[10]Petitioner states (Pet. Br. 4) that it is "highly uncertain" whether its claim against the Iranian defendants is within the jurisdiction of the Claims Tribunal, because that jurisdiction does not extend to "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts" (Decl. II, Art. II; Pet. App. 31). Petitioner's contract provides that if a dispute between the parties cannot be

also *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority, supra*, at 23-24; *American Int'l Group, Inc.* v. *Islamic Republic of Iran, supra*, slip op. 34-38. We agree with petitioner that this aspect of the taking issue need not be considered here. Petitioner's suit against the Iranian defendants in California has not been dismissed, thereby *terminating* its cause of action in United States courts. The claim underlying that suit has only been *suspended*, and this suspension will in turn require only a stay of judicial proceedings pending presentation of the claim to arbitration. Thus, there can be no argument at this stage that petitioner's property has been taken. There will be time enough to consider a taking argument if the district court eventually

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resolved through discussions, the dispute shall be submitted to conciliation by three conciliators, one to be appointed by each party and the third to be appointed by an agency of the Government of Iran. If either party does not accept the decision of the conciliators, the contract provides that "the matter shall be decided finally by resort to the courts of Iran" (Pet. Br. 4 n.2).

The United States has taken the position that a clause giving Iranian courts jurisdiction over disputes arising under the contract may not be "binding" within the meaning of the clause excluding claims arising under certain contracts from the Tribunal's jurisdiction, because circumstances have so changed in Iran that enforcement of the provision would be inconsistent with the parties' intent when they entered into the contract. See *Iranian Asset Settlement: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 68 (1981). Under the Agreement, the Tribunal is to decide cases on the "basis of respect for law, * * * taking into account relevant usages of the trade, contract provisions and changed circumstances" (Decl. II, Art. V; Pet. App. 33). The reference to "changed circumstances" in Article V was included for the specific purpose of bringing the changed circumstances doctrine into play with respect to forum clauses. *Hearing, supra*, at 68. In addition, the government has taken the position that, even if forum clauses are "binding" for purposes of the Agreement, clauses such as the one in petitioner's contract that provide for arbitration or conciliation prior to resort to the courts of Iran do not relate to disputes "within the *sole* jurisdiction of the competent Iranian courts" for purposes of the exclusionary clause in Declaration II, Article II (emphasis added).

orders petitioner's suit against the Iranian defendants dismissed following a ruling by the Claims Tribunal on the merits of petitioner's claim—assuming, of course, that petitioner would be dissatisfied with the award and would oppose the order of dismissal.[11]

There would, moreover, be a host of factors to be taken into account in considering the taking issue, many of which are necessarily speculative at the present time. First, of course, is the question whether there could ever be a taking of property for purposes of the Just Compensation Clause resulting from the United States' settlement of a claim against a foreign government, in view of the established doctrine that claims taken up by the United States belong to the United States. See Govt. Br. 49; see also *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *Great Western Insurance Co.* v. *United States*, 19 Ct. Cl. 206, 217-218; aff'd on other grounds, 112 U.S. 193 (1884); *Arts Gloves, Inc.* v. *United States*, 420 F. 2d 1386 (Ct. Cl. 1970).[12]

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[11]Thus, this is not a case that will lead inexorably to a final conveyance of property without an opportunity for prior judicial review to consider the availability of a Tucker Act remedy. Compare *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127, 138-141 (1974). In any event, an injunction should not be entered to prevent the implementation of an Executive Agreement of the President in circumstances such as this on the basis of mere speculation that the remedies provided will not be adequate in a few individual cases.

[12]*Gray* v. *United States*, 21 Ct. Cl. 340 (1886), does not indicate that there would be a compensable claim. Unlike the present situation, there the court found a taking because the American claims were valid, would have been honored by the French, and were released in full by the United States. See *Aris Gloves, Inc.* v. *United States*, *supra*, 420 F. 2d at 1396-1397 (Nichols, J., concurring). In the present case, the Executive has not *renounced* petitioners claim in a similar fashion. Moreover, *Gray* was "strictly an advisory opinion [for Congress] which was not binding upon either of the parties and cannot be binding upon subsequent courts" (420 F. 2d at 1393). As this Court said of *Gray*, "[w]e think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace and not of right." *Blagge* v. *Balch*, 162 U.S. 439, 457 (1896).

Second, assuming that a taking could be found in some such circumstances, the appropriate test in a situation involving an en bloc settlement of claims, we submit, should be whether, under the circumstances, the settlement provided for a reasonable recovery (or procedure for recovery) for the claimants as a group (cf. *United States* v. *Sioux Nation of Indians*, No. 79-639 (June 30, 1980), slip op. 35-50), not whether any particular claimant would have received more in United States courts than he did in a lump sum settlement or through an arbitration mechanism. Indeed, any other rule would perhaps end the long-standing practice of en bloc claims settlement by the Executive.

Third, if it were necessary to focus on the effects of a settlement on each individual claim comprised therein, a court considering a taking claim would be required to conduct a complex trial to determine whether the value received in settlement was in fact less than would have been received in domestic litigation. This would in turn depend on a variety of factors, many of which are unrelated to the merits of the particular contract, expropriation, or other claim that had been settled.[13]

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[13]Thus, in order to prove a taking of property in the context of the Iranian Agreement, a claimant would have to demonstrate some or all of the following: (1) that its underlying claim is meritorious; (2) that the claim would have been decided by an American court notwithstanding such defenses as sovereign immunity, act of state, lack of sufficient contacts for in personam jurisdiction, or perhaps an Iranian forum clause; (3) that the claimant could have executed on a domestic judgment against Iranian property that would have remained in this country even absent the President's blocking order; (4) that the Tribunal's award was less than that a domestic court would have rendered; (5) that the claimant could not recover on an award from the Tribunal either from the $1 billion Security Account or the funds used to replenish and maintain that account at a minimum of $500 million; (6) that the claimant could not satisfy any Tribunal award in the courts of other nations, even those who are a party to the Convention on Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997; and (7) that it award would not be satisfied out of funds received by the United States as damages if Iran should default under the Agreement.

Finally, there is the question of what would constitute just compensation for the settlement of an international claim for less than its estimated value in domestic courts. Cf. *United States* v. *Fuller*, 409 U.S. 488, 490 (1973).

These issues obviously are better left for resolution in the case of a particular claimant who can demonstrate a concrete effect on his financial position. *Hodel* v. *Virginia Surface Mining & Reclamation Association*, Nos. 79-1538, 79-1596 (June 15, 1981), slip op. 26-31.

For the foregoing reasons and the additional reasons stated in our opening brief, it is respectfully submitted that the judgment of the district court should be affirmed.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1981

DOJ-1981-06

No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, the Secretary of the Treasury of the United States of America, and THE UNITED STATES OF AMERICA,

Respondents,

and

BANK MARKAZI IRAN, THE ISLAMIC REPUBLIC OF IRAN and THE ATOMIC ENERGY ORGANIZATION OF IRAN,

Intervenors.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF INTERVENOR BANK MARKAZI IRAN

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TABLE OF CONTENTS

PAGE

I. The President's Claims Settlement Powers, Including His Actions in Entering Into and Implementing the Algerian Declarations, Have Been Facilitated, Acquiesced in and Approved by Congress and the Courts 1

II. The President's Actions in Compelling the Transfer of Iranian Assets and Nullifying Petitioner's Attachments Are Authorized by the IEEPA 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:

Blagge v. *Balch*, 162 U.S. 439 (1896) 5

Glass v. *The Sloop Betsy*, 3 U.S. (3 Wall.) 6 (1794) 6

Gray v. *United States*, 21 Ct. Cl. 340 (1886) 5

Ozanic v. *United States*, 133 F.2d 228 (2d Cir. 1951) 5

United States v. *Belmont*, 301 U.S. 324 (1937) 6, 7

United States v. *Pink*, 315 U.S. 203 (1942) 5, 6, 7

United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) 5, 6

Youngstown Sheet & Tube Company v. *Sawyer*, 343 U.S. 579 (1952) 1, 4

Statutes: PAGE

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602 *et seq.* ..... *passim*

International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621, *et seq.*, as amended (1980) 3

22 U.S.C. § 1644b 3

International Economic Emergency Powers Act, 50 U.S.C. §§ 1701 *et seq.* ..... *passim*

Judiciary Act of 1789, 1 Stat. 76 6

Pub. L. 88-666, Section 511(b), 78 Stat. 1113 (October 10, 1964) 8

Pub. L. 89-262, Section 5, 79 Stat. 1988 (October 16, 1965) 8

Pub. L. 96-446, 94 Stat. 891 (October 13, 1980) 3

Pub. L. 96-606, Section 702(5), 94 Stat. 3534 (December 28, 1980) 3

1 Stat. 715 (1799) 6

Trading With the Enemy Act, 50 U.S.C. App. § 5(b) 8

Other Authorities:

Hearings Before the Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary on H.R. 3493, 93d Cong., 1st Sess. (1973) 2

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976) 2, 7

5 Moore, International Law Digest (1906) 6

J.B. Moore, Treaties and Executive Agreements, 20 Pol. Science Q. 385 (1905) 6

PAGE

Revision of Trading With the Enemy Act: Markup Before the House Committee on International Relations, 95th Cong., 1st Sess. (1977) 8

S. Rep. No. 89-795, 89th Cong., 1st Sess. (1965) 8

S. Rep. No. 94-1188, 94th Cong., 2d Sess. (1976) 3

S. Rep. No. 95-466, 95th Cong., 2d Sess. (1977) 3

14 M. Whiteman, Digest of International Law (1977) .. 6

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REPLY BRIEF OF INTERVENOR BANK MARKAZI IRAN

I.

The President's Claims Settlement Powers, Including His Actions in Entering Into and Implementing the Algerian Declarations, Have Been Facilitated, Acquiesced in and Approved by Congress and the Courts.

A. Petitioner attempts to analyze this case as falling within the third category of the framework for analyzing separation of powers questions relating to foreign affairs set forth by Mr. Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube* v. *Sawyer*, 343 U.S. 579, at

635-638 (1952). Petitioner places exclusive emphasis upon the Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§ 1601 *et seq.*, and upon selected quotations from the legislative history of that Act. We will not repeat here the argument set forth in our principal brief (Pr. Br. at 29-31) and in the Brief for the Federal Respondents (U.S. Br. at 59-60), demonstrating that the FSIA was intended to and did deal solely with questions of sovereign immunity, and was not meant in other ways to restrict the power and ability of the Executive branch to resolve an undisputed international crisis.[1]

We do emphasize that petitioner's attempt to categorize this case as falling into the third category of Mr. Justice Jackson's analytical framework requires petitioner to ignore the consistent practice of Congress acquiescing in, approving and facilitating the President's claims settle-

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[1] Petitioner's suggestion (Pet. Br. at 15, n. 16) that Congress provided that no "future" international agreements could "affect" the FSIA is predicated upon a gross distortion of the legislative history and an out-of-context reading of congressional reports. The language in the FSIA legislative history referring to "future international agreements" relates only to post-FSIA agreements regarding sovereign immunity, not agreements settling claims. Indeed, the House Report explained explicitly that the deletion of the "future agreements" language was made because:

> [m]ention of future agreements was found to be unnecessary and misleading. The purpose for including the reference was to take into account the possibility that sovereign immunity might become the subject of an international convention. Such a convention would, under Article VI of the Constitution, take precedence, whether or not the bill was made subject to future international agreements.

H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. 10 (1976). *See also, Hearings Before the Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary on H.R. 3493*, 93d Cong., 1st Sess. 87 (1973) ("of course, we know that because of the constitutional authority, the rulings of the court on executive agreements, treaties, and so forth, that that can take preeminence over statute") (Rep. Moorehead).

ment powers. *See*, generally, Appendix B to our principal brief. This congressional practice has continued in significant ways during and after the period of Congress' consideration and enactment of the FSIA. In particular: (1) the Congress which enacted the FSIA also considered but did *not* enact proposals designed to limit the power of the Executive to enter into Executive agreements, including claims settlement agreements (*see* Pr. Br. at 31-32; U.S. Br. at 61); (2) the same Congress amended the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621, *et seq.*, as amended (1980), to permit the Foreign Claims Settlement Commission to determine claims by United States nationals against the German Democratic Republic (22 U.S.C. § 1644b), to enable the Executive to "be in a better position to negotiate an adequate settlement . . . of these claims" (S. Rep. No. 94-1188, 94th Cong. 2d Sess. 2 (1976)); (3) one year later, Congress recognized and acted to facilitate the President's claims settlement authority when it enacted the International Economic Emergency Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.* While one purpose of the IEEPA was to restrict Executive emergency powers in ways not relevant here (*see* Pr. Br. at 9-10, n. 3), Congress explicitly stated that "nothing in this Act is intended . . . to impede the settlement of claims of United States citizens against foreign countries," S. Rep. No. 95-466, 95th Cong. 2d Sess. 6 (1977); (4) in 1980, Congress amended the International Claims Settlement Act of 1949 to provide for determination of claims against Vietnam, again looking forward to an eventual Executive "agreement settling those claims" (Pub. L. 96-606, Section 702(5), 94 Stat. 3534, 3535 (December 28, 1980)); (5) Congress has indicated its approval of the Executive claims settlement agreement with the People's Republic of China (*see* Pub. L. 96-446, 94 Stat. 891 (October 13, 1980)).

Finally, and perhaps most significantly, Congress, after due consideration of the Algerian Declarations, refused to exercise its statutory authority under the IEEPA, 50 U.S.C. at §§ 1703, 1706, to block implementation of those aspects of the Executive's actions undertaken pursuant to that Act, which include, at the least, the nullification of attachments and judgments and the orders requiring transfer of the Iranian assets. *See* discussion in Appendix B to our principal brief at B-23 to B-25. Congress' failure to express disapproval of the Executive's action, or to take the steps to prevent implementation of the Declarations which Congress itself had established as a means to prevent Executive overreaching under the Act, are of the greatest significance. In no sense can the President be said to have acted contrary to the will of Congress and thus, in the words of Justice Jackson, with his power at "its lowest ebb." *Youngstown*, 343 U.S. at 638. Rather, the Executive's actions have been consistent with a "systematic, unbroken, Executive practice long pursued to the knowledge of Congress, and never before questioned." *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring). Accordingly, the President acted with the express or implied authorization of Congress, and thus, in terms of Justice Jackson's framework, with his powers at their maximum.

B. Petitioner's misreading of the effect of the FSIA upon the President's claims settlement powers derives from a fundamental error concerning the nature and purpose of that power. Petitioner focuses exclusively on the use of the claims settlement power as a means of facilitating the recovery by United States nationals of claims against foreign states and their citizens. But from the earliest days of its use, the claims settlement power was

utilized for a more important and overriding purpose: to enable the Executive to normalize relations with foreign states by means other than war, thereby providing for the peace and economic well-being of the entire nation. It is this latter concern which echoes through the judicial decisions and congressional debates (*see*, Appendix B to our principal brief) upholding the Executive's claims settlement powers. *See United States* v. *Pink*, 315 U.S. 203, 229 (1942) and 315 U.S. at 240 (Frankfurter, J., concurring); *Ozanic* v. *United States*, 133 F.2d 228, 231 (2d Cir. 1951). *See Gray* v. *United States*, 21 Ct. Cl. 340 (1866); *Blagge* v. *Balch*, 162 U.S. 439 (1896).

When considered in this light, it is not surprising that in enacting the FSIA Congress made no mention of the claims settlement issue, either in the text of the Act or the legislative history. Nor is it surprising that, as discussed above, after enactment of the FSIA Congress continued to acknowledge, approve and facilitate the Executive's exercise of the claims settlement power. The FSIA quite simply was irrelevant to the question of claims settlement. It simply was not contemplated by Congress or by the Executive branch, which drafted and urged passage of the Act, that the FSIA would disenable the President from acting in an undisputed international emergency to settle claims in a manner consistent with a practice as old as the Republic itself.

C. Petitioner makes little mention of the judicial authority, including decisions of this Court, recognizing and upholding the claims settlement power. Petitioner's half-hearted attempt to distinguish such cases fails.

Petitioner argues that *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), is not relevant because the settlement of claims involved in that case was effected by

a treaty, not an executive agreement.[2] Petitioner ignores the fact that historically claims settlements have been made by either method without legal distinction, and that in the past century executive agreements have been the usual practice. *See* 5 Moore, *International Law Digest* 221-222 (1906); J.B. Moore, *Treaties and Executive Agreements,* 20 Pol. Science Q. 385 (1905); 14 Whiteman, *Digest of International Law* 247 (1977). More importantly, petitioner ignores this Court's discussion of the historic claims settlement practice in *United States* v. *Belmont,* 301 U.S. 324 (1937) and *United States* v. *Pink,* 315 U.S. 203 (1942), in which the Court held that such international compacts do not require participation of the Senate. *See Belmont,* 301 U.S. at 330-31.

Petitioner further argues that *Belmont* and *Pink* are "not on point" (Pet. Br. at 19) because they are "fundamentally Supremacy Clause cases, holding that the terms of an Executive agreement take precedence over a con-

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[2] In an effort to avoid the clear command of *Schooner Peggy,* petitioner attempts to elevate the differences in prize procedures, particularly *de novo* review on appeal, into a matter of constitutional significance (Pet. Br. at 19, n. 19). The differences in admiralty procedure, however, are irrelevant here and have no impact on the rule of law established in *Schooner Peggy.* What is constitutionally significant is that the federal courts had Article III jurisdiction over the prize proceeding pursuant to § 9 of the Judiciary Act of 1789, 1 Stat 76; *Glass* v. *The Sloop Betsy,* 3 U.S. (3 Wall.) 6, 16 (1794). Moreover, the Court's ruling was not the result of a *de novo* review of the facts on appeal, but of the application of an intervening international agreement which terminated a judgment in favor of private parties.

Petitioner also suggests that the claimants in *Schooner Peggy* had no right to object to the claims settlement because, as crew members, they were "government agents" (*Ibid.*). But Congress had given the individual seamen a cause of action and the right to a portion of the prize. 1 Stat 715 (1799). While the FSIA permits individuals to bring claims against foreign sovereigns under certain circumstances, the 1799 statute, unlike the FSIA, created a right in the prize; the FSIA creates no substantive rights.

flicting state law policy . . . or state court order . . ." (*Id.* at 19-20). Petitioner's distinction is no distinction at all. Petitioner's cause of action is founded upon the law of California, pursuant to the public policy of that state. Petitioner equally could have brought suit in the state courts, as well as in federal court. The FSIA, at the most, merely conferred *jurisdiction* on the federal courts over petitioner's claim. The Act does not and was "not intended to affect the substantive law of liability." H.R. Rep. No. 94-1487, 94th Cong., 2nd Sess. (1976), *reprinted in* U.S. Code Cong. & Admin. News 6604, at 6610.

Thus, in entering into the Algerian Declarations, the President exercised paramount federal authority under his constitutional and statutory powers. Just as in *Belmont* and *Pink*, the President's actions take precedence over conflicting state laws and policy.

II.

The President's Actions in Compelling the Transfer of Iranian Assets and Nullifying Petitioner's Attachments Are Authorizied by the IEEPA.

Petitioner argues that the "transfer order here is for all practical purposes a vesting order," which is not authorized by the IEEPA (Pet. Br. at 29). However, as is clear from the statute itself, vesting, as defined by Congress, means to take title to the property of a foreign state.[3] Here, the Executive has neither legally, nor prac-

[3] As the legislative history of the IEEPA indicates, the reason that Congress, with the assent of the Executive, excluded the vesting provision from the emergency powers contained in Title II of the Act was not out of concern with the protection of American claimants. Rather, neither Congress nor the Executive felt that a foreign government's property ought to be confiscated absent war. However, if Americans were "dying overseas" in a war, Congress

tically, attempted to take title to Iranian property in the United States.

In urging that vesting turns on the permanent or temporary nature of the Executive's order, petitioner simply ignores or forgets that it is ownership in property that is vested. Here, it is the Iranian entities which own the

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felt that enemy property could be vested by the President. *Revision of Trading With The Enemy Act: Markup Before the House Committee on International Relations*, 95th Cong., 1st Sess. 18 (1977).

Similarly, in 1965 the State Department obtained repeal of the provisions of a statute (Pub. L. 88-666, § 511(b), 78 Stat. 1110 (October 16, 1964)), which had provided for the vesting and sale of assets owned by the Cuban Government which previously had been frozen pursuant to Section 5(b) of the Trading With The Enemy Act, 50 U.S.C. App. § 5(b). The State Department took the view which "persuaded" Congress that:

> . . . the vesting and sale of Cuban property could set an unfortunate example for countries less dedicated than the United States to the preservation of property rights. The Government of the United States, as a matter of policy, encourages the investment of American capital overseas and endeavors to protect such investments against nationalization, expropriations, intervention, and taking. To vest and sell Cuban assets could, therefore, be counterproductive. It would place the Government of the United States in the position of doing what Castro has done. It could cause other governments to question the sincerity of the U.S. Government in insisting upon respect for property rights. The result could be a reduction, in an immeasurable but real degree, of one of the protections enjoyed by American-owned property around the world. Should this protection be diminished, the task of economic development to which the United States is devoting a great part of its strength and resources could become more difficult because of an attendant decrease in such investment.

Claims Against The Government of Cuba, S. Rep. No. 89-795, 89 Cong., 1st Sess. (1965), *reprinted at* [1965] U.S. Code Cong. & Ad. News 3581, 3583-84. *See* Pub. L. 89-262, Section 5, 79 Stat. 1988 (October 16, 1965) repealing the vesting provision.

Again, it was not concern for the rights of American creditors which led the Executive to argue against vesting but concern over creating the precedent of confiscating property of a foreign government or foreign nationals in non-war time situations.

property in question, not petitioner, and only if *they* were being "permanently" deprived of ownership could there even be an argument over whether vesting had occurred.

Petitioner claims that the "President's transfer order here seeks to dispose of Iranian assets by permanently divesting American creditors of their statutory rights against the property" (Pet. Br. at 28). However, as the *Zittman-Orvis-Brownell* line of cases makes absolutely clear, petitioner has no "interest, right or title" in the attached property here which can be asserted against the United States. Any interest that petitioner acquired vis-à-vis Iran with respect to Iranian property must be subordinate to the paramount interest of the Executive in administering the assets control regulations. Therefore, when compelling the transfer of assets, the Executive has not deprived petitioner of any rights whatsoever, since any rights it had were subject to the Executive's authority to control the Iranian assets.

Petitioner's construction of the IEEPA would lead to the absurd conclusion that the President would not have the power to resolve national emergencies because of attachments achieved under state law, attachments which were only possible because of the blocking order itself. To suggest that the President does not have the power to return the assets to their status prior to the blocking order and thus to allow their transfer out of the country, is tantamount to perpetuating the national emergency by virtue of the exercise of the very powers which were designed to allow the President to deal with the emergency. Certainly, Congress could not have intended such a result.

CONCLUSION

For the reasons stated above, and in our principal brief, the judgment of the district court should be affirmed.

Dated: June 23, 1981

Respectfully submitted,

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No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

DAMES & MOORE, a partnership,
Petitioner,

v.

DONALD T. REGAN, the Secretary
of the Treasury of the United States
of America, and THE UNITED STATES OF AMERICA,
Respondents,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE ATOMIC ENERGY ORGANIZATION OF
THE ISLAMIC REPUBLIC OF IRAN,
and
BANK MARKAZI IRAN,
Intervenor-Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit Before Judgment

REPLY BRIEF FOR INTERVENOR-RESPONDENT THE ISLAMIC REPUBLIC OF IRAN

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
I. PETITIONER ADMITS THAT THE EXECUTIVE POSSESSES STATUTORY AUTHORITY TO BLOCK FOREIGN ASSETS, AND PETITIONER'S ATTEMPT TO EQUATE TRANSFER WITH VESTING MUST FAIL	2
II. THE EXECUTIVE'S AUTHORITY TO SETTLE PETITIONER'S CLAIM, WITHOUT CONGRESSIONAL RATIFICATION, IS WITHIN THE CONSTITUTIONAL POWERS OF THE PRESIDENT	8
CONCLUSION	15

TABLE OF AUTHORITIES

	Page
CASES:	
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)	7
Orvis v. Brownell, 345 U.S. 183 (1953)	5,6
United States v. Belmont, 301 U.S. 324 (1937)	7
United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 102 (1801)	9
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 578 (1952)	8,10
Zittman v. McGrath, 341 U.S. 446 (1951)	5,6
Zittman v. McGrath, 341 U.S. 471 (1951)	5
CONSTITUTIONAL PROVISION:	
U.S. Const., art. VI, cl. 2	7
STATUTES & REGULATIONS:	
22 U.S.C. §1623(h) (1976)	14
28 U.S.C. §1332(a)(2),(3) (1976)	12
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1391(f), 1441(d), 1602-11 (1976)	10,11,13
§1330	12
§1604	12
International Emergency Economic Powers Act, 50 U.S.C. §§1701-1706 (Supp. III 1979)	*passim*
§1702(a)(1)(B)	2
§1702(b)(1)(B)	7
Trading with The Enemy Act, 50 U.S.C. app. §§1-44 (1976 & Supp. III 1979)	2,9
§5(b)	2
§9(a)	5,6
§34	5,6
50 U.S.C. app. §2010 (1976)	14
31 C.F.R. §535.310 (1980)	7

Page

EXECUTIVE AGREEMENT:

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Jan. 19, 1981) 14

Article IV, §1 14

LEGISLATIVE MATERIALS:

H.R. Rep. No. 1487, 94th Cong., 2d Sess. *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604 12,13

H.R. Rep. No. 459, 95th Cong., 1st Sess. (1977) 2-3

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BANK MARKAZI IRAN,
Intervenor-Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit Before Judgment

REPLY BRIEF FOR INTERVENOR-RESPONDENT THE ISLAMIC REPUBLIC OF IRAN

ARGUMENT

I. PETITIONER ADMITS THAT THE EXECUTIVE POSSESSES STATUTORY AUTHORITY TO BLOCK FOREIGN ASSETS, AND PETITIONER'S ATTEMPT TO EQUATE TRANSFER WITH VESTING MUST FAIL.

Petitioner contends that "ordering the transfer of [Iran's] property beyond the jurisdiction of United States courts . . . is wholly inconsistent with the purposes and legislative history of the [International Emergency Economic Powers Act] and is totally unprecedented either in peacetime or wartime." (Pet. Brief at 24). However, nothing in the legislative history of that Act supports petitioner's attempt to avoid the plain meaning of 50 U.S.C. §1702(a)(1)(B). Nor is the authority conferred by the Act limited to the specific form foreign claims settlement programs have taken in the past.

Petitioner bases its interpretation of the legislative history of the International Emergency Economic Powers Act, 50 U.S.C. §§1701-1706 (Supp. III 1979) (the "IEEPA"), upon the fact that the IEEPA does not contain the power to vest foreign assets contained in the Trading with The Enemy Act, 50 U.S.C. app. §§1-44 (1976 & Supp. III 1979). *Compare* 50 U.S.C. §1702(a)(1)(B) *with* 50 U.S.C. app. §5(b). According to petitioner:

> The fundamental distinction between the authority to freeze foreign assets which IEEPA preserved and the vesting power which IEEPA abolished has always been that a freeze, however uncertain its precise duration, results in a temporary and not permanent disposition of foreign property.

(Pet. Brief at 28). Petitioner contends that unblocking Iran's property and directing its transfer outside the United States effects a "permanent disposition" of that property which is "for all practical purposes a vesting order." (*Id.* at 28-29).

The attempt to equate any "permanent disposition" of blocked assets with vesting ignores the legislative history upon

which petitioner attempts to rely. Petitioner quotes the IEEPA House Report which states that Congress did not include in the IEEPA: "(1) the power to vest, *i.e.*, to take title to foreign property." H.R. Rep. No. 459, 95th Cong., 1st Sess. 15 (1977) (the "IEEPA House Report") (Pet. Brief at 26). Obviously, Congress did not define vesting to mean "permanent disposition" of foreign assets. (Pet. Brief at 28). Congress understood "vest" to mean "to take title to foreign property." IEEPA House Report at 15. Since Congress did not equate every "permanent disposition" of foreign assets with vesting, petitioner's reliance upon the absence of the power to vest in the IEEPA is misplaced.

Petitioner admits that the IEEPA does include the power "temporarily to freeze or block foreign assets." (Pet. Brief at 28). Petitioner further admits that

> the possible *unblocking* of billions of dollars of foreign assets previously frozen under a proper exercise of IEEPA authority is a powerful negotiating chip and has been used effectively in connection with settlements whereby, in exchange for an order unblocking assets, the foreign government has agreed to pay into a fund from which American claims would be paid.

(Pet. Brief at 32 n.31) (emphasis in original). In this respect the IEEPA House Report states: "Holding the assets of a foreign country is generally the most effective means of achieving settlement of U.S. claims." IEEPA House Report at 17. Nevertheless, petitioner would dictate the manner in which the Executive may regulate transfers of foreign assets once unblocked and thereby effectively destroy the Executive's negotiating ability to achieve peaceful resolutions of disputes with foreign states.

According to petitioner, the only means whereby the Executive can unblock foreign assets is "to allow [the] blocking controls to expire, leaving American creditors to whatever judicial remedies they may then have . . . . " (Pet. Brief at 32). If the Executive were required simply "to allow [the] blocking

controls to expire," then "the possible *unblocking* of . . . foreign assets . . . [would no longer be] a powerful negotiating chip . . . ." (Pet. Brief at 32 n.31) (emphasis in original). Under such circumstances it is difficult to see why "in exchange for an order unblocking assets, [a] foreign government [would] agree to pay into a fund from which American claims would be paid." (*Id.* at 32 n.31). Absent removal of outstanding attachments, the practical effect of unblocking would be that claimants could prevent the movement of a foreign state's property. In short, petitioner's position is contradictory to, and would frustrate, Congress' intention to permit the Executive in response to a national emergency to use control over foreign assets under United States jurisdiction in negotiations with a foreign state.

The Executive's action compelling transfer of Iran's property does not amount to the exercise of any greater or different authority than the blocking of that property, which petitioner admits was authorized by the IEEPA. (Pet. Brief at 28). Blocking Iran's property prevented the acquisition or transfer of any interest in the property, other than limited interests authorized under and subject to the blocking program. The *status quo* with respect to the property was frozen as of the time of blocking. On that date, November 14, 1979, Iran possessed full sovereignty and control over its property and petitioner had not attached that property. In ordering Iran's property transferred, the Executive has revoked licenses with respect to Iran's property acquired after November 14, 1979—licenses authorized under and subject to the blocking program.[1]

Petitioner's contention that it could alter the *status quo* during the freeze—and thereby acquire a benefit from the blocking program without accepting its restrictions—rests on the assertion that "the license here and its conditions are of no legal effect . . . . " (Pet. Brief at 29 n.29). Petitioner relies upon

[1] The Government of Iran reserves its position that the actions taken to implement the United States' interpretation of its obligations to Iran do not fully discharge those obligations.

Zittman v. McGrath, 341 U.S. 446 (1951) ("*Zittman I*"), in which the Alien Property Custodian sought to nullify attachments of blocked property and transfer possession of the property from the holder to the Custodian. The Court refused to nullify the attachments, but its holding allowed the Custodian to transfer the property notwithstanding the attachments: "[T]his result . . . in no way impairs control over alien property . . . ." 341 U.S. at 464. That the Custodian may direct the transfer of blocked property, notwithstanding attachments, was affirmed contemporaneously in *Zittman v. McGrath*, 341 U.S. 471 (1951) ("*Zittman II*").

In refusing to nullify the attachments in *Zittman I*, the Court relied heavily upon the Government's assertions in a related case that continuation of the attachments would not be objectionable, provided that the Court accepted the Government's "analysis of what the nature of any attachment action against a blocked account must be, in light of the purposes of freezing control . . . ." 341 U.S. at 456. The settlement program in *Zittman I* required claimants to litigate their claims before the Custodian could pay those claims. 341 U.S. at 457. The Government did not object to litigation by the claimants "to clarify their rights and liabilities," provided that there was no interference with the Government's control over the foreign assets. 341 U.S. at 456. Because such litigation depended upon *quasi-in-rem* jurisdiction, without the attachments claimants could not have obtained an adjudication of their claims satisfactory to the Custodian and the settlement scheme would have been "stalemated". 341 U.S. at 457. Thus, in *Zittman I* the attachments did not interfere with the transfer of the assets to the Custodian and furthered the settlement program. *Zittman I* lends no support to petitioner's attempt to block transfer of Iranian assets.

Petitioner's attempt to dictate the manner in which the Government can dispose of blocked assets is rejected directly by this Court's holding in *Orvis v. Brownell*, 345 U.S. 183 (1953), which petitioner attempts to distinguish. (Pet. Brief at 29 n.29). In *Orvis* the plaintiff sought to compel the Custodian to treat its claim under Section 9(a) of the TWEA, rather than

section 34. Section 34 of the TWEA provides for the settlement by the Custodian of claims of United States claimants against alien debtors, whereas section 9(a) permits persons claiming "any interest, right or title" in property held by the Custodian to recover that property or property interest directly from the Custodian. 345 U.S. at 184-85 n.1. Thus, section 9(a) permits assets to be removed from the common settlement fund, and section 34 provides for the settlement of claims from that fund. 345 U.S. at *id.* In *Orvis* the Court held that the freezing order prevented the subsequent acquisition of a lien which would constitute "any interest, right or title" according to section 9(a). 345 U.S. at 186, 188. The Court refused to permit the plaintiff to remove assets from the common fund under section 9(a) and consigned plaintiff's claim to the settlement program provided under section 34.

In both *Zittman I* and *Orvis,* the issue was the effect of a freeze program upon plaintiff's attachment rights.[2] In *Zittman I* the issue was whether the freezing order prevented the acquisition of such rights by attachment as would prevent the Custodian from transferring the assets. In *Orvis* the issue was whether the freezing order prevented the acquisition of such attachment rights[3] as would prevent the Custodian from distributing the assets according to the common settlement program.

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[2] In *Zittman I* the Court said: "The question is whether the attachment levies were 'transfers' forbidden by [the freezing order]." 341 U.S. at 449. In *Orvis* the Court said, "We are now called upon to decide . . . whether the freezing order prevented a creditor from thereafter acquiring by attachment an 'interest, right or title' in property such as will support a claim against the Custodian under §9(a) of the . . . [TWEA]". 345 U.S. at 186 (footnote omitted).

[3] Petitioner and The Marschalk Co., Inc. argue that their attachments constituted perfected, valid property rights under the state law of California and New York, respectively, which are not subject to executive interference and which entitle them to compensation. (Pet. Brief at 35; *Amicus* Brief at 12).

This argument overlooks the supremacy of the federal actions preventing the creation of interests in foreign assets. The IEEPA

(Footnote continued on following page)

Neither case turned on the act of vesting. Vesting was merely the particular settlement scheme adopted by the Government under the circumstances existing at that time. Nothing in either case requires the United States to effect claims settlements through domestic adjudication and a domestically administered fund, rather than through an international arbitration and escrow fund. Together the controlling cases establish that the blocking authority encompasses the power to transfer foreign assets and to dispose permanently of those assets, without interference from "post-freeze" attachments.

(Footnote continued from preceding page)

specifically authorizes the President to prohibit the "acquisition", "transfer", or "exercising any right" to foreign property. 50 U.S.C. §1702 (b) (1) (B). By regulation the Treasury Department prohibited the creation of any lien as a result of obtaining attachments. "Prohibited transfers" were defined to include the "creation . . . of any lien, the issuance, docketing, filing, or the levy of or under any judgment . . . attachment . . . or other judicial . . . process or order." 31 C.F.R. §535.310 (1980) (Iran App. 16a).

Under the Supremacy Clause, U.S. Const., art. VI, cl. 2, the Treasury regulations are federal law supreme over state laws. In United States v. Belmont, 301 U.S. 324, 331 (1937), Justice Sutherland said:

> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies . . . . And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. . . .

See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).

Thus, to the extent California and New York law purported to create a lien by way of attachment, state law was superceded by federal law prohibiting the acquisition of liens against blocked property. Claimants obtained no valid property right pursuant to their attachments.

II. THE EXECUTIVE'S AUTHORITY TO SETTLE PETITIONER'S CLAIM, WITHOUT CONGRESSIONAL RATIFICATION, IS WITHIN THE CONSTITUTIONAL POWERS OF THE PRESIDENT.

The only question now remaining on this appeal concerning the validity of the settlement of petitioner's claim is whether the President alone can assert the power to settle the claim. The President's authority lies, under the most narrow possible interpretation, within the second category of presidential authority delineated by Justice Jackson and, broadly construed, within the first category.

> 1. When the President acts pursuant to an express or *implied* authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right, plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty . . . .
>
> 2. When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility . . . .

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (emphasis added). The Government of Iran has pointed to the long history of executive claims settlement agreements negotiated by the President and the refusal of Congress to enact legislation restricting the President's authority to enter into such agreements. (Iran Brief at 16 n.20, 35-36). In the context of the IEEPA, Congress anticipated subsequent claims settlements, inasmuch as Con-

gress indicated that the withdrawal of certain TWEA powers effected by the IEEPA was not intended to impact the President's authority to settle claims of United States citizens. (*Id.* at 39 n.36). Further, Congress has taken no action with regard to this particular claims settlement agreement that could be construed as disapproval. (*Id.* at 39 n.37; *see id.* at 22-24). If Congress has approved this settlement, as the Government of Iran argues (*Id.* at 38-39), then the President's actions may be invalidated only if the federal government as a whole could not undertake such actions. Petitioner, *sub silentio,* has conceded that the federal government, acting as a whole, could settle petitioner's claim.[4] Thus, if the President's actions have been implicitly authorized by Congress, petitioner has conceded that settlement is valid.

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[4] *See* Pet. Brief at 19 (where Petitioner distinguishes United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 102 (1801), primarily on the ground that that settlement was effected by treaty), and at 23 (where Petitioner states that "Congress may confer that power . . . .").

Amici are in disarray as to whether the Executive has inherent authority to settle claims of United States nationals against foreign states. Four briefs acknowledge the authority. American Bell International Inc. "makes no assault on the President's authority to settle international claims between United States nationals and foreign states . . . ." (*Amicus* Motion at ii; Brief at 3-4, 11). The Marschalk Co., Inc. does not dispute the Executive's "limited" authority to settle expropriation and nationalization claims—but does dispute authority to settle claims based on commercial transactions occurring within the United States. (*Amicus* Brief at 5, 8 & nn.8 & 9). Petitioner's claim, for example, is based on a commercial transaction occurring in Iran. (App. to Brief of Intervenor-Respondent Atomic Energy Organization of Iran at A-25 to 35). Similarly, the Sperry Corporation *amici* distinguish prior claims settlements on the ground that they did not involve commercial claims. (*Amici* Brief at 14-15). Petitioner itself restricts its challenge to settlement of commercial claims. (Pet. Brief at 9-23). Finally, Sylvania Technical Systems Inc. "does not argue that the United States is powerless to enter into a settlement of foreign claims held by United States citizens." (*Amicus* Brief at 16-17).

Alternatively, if the Court is convinced that Congress has expressed neither disapproval or approval of this exercise of Executive branch authority, the authority challenged must be upheld as necessary to the discharge of the office of the President. (*Id.* at 35-36).

Petitioner has sought to demonstrate that Congress implicitly denied to the President the power to settle claims of United States citizens by enacting a statute that withdrew from the President the power to determine when a foreign state's sovereign immunity should be recognized. The Court is asked to apply Justice Jackson's third standard in *Youngstown*:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . . .

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 637 (quoted in Pet. Brief at 16). If petitioner can persuade the Court that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1391(f), 1441(d), 1602-11 (1976) (the "FSIA") constitutes an implicit denial of the President's authority, petitioner contends that the President's actions conflict with petitioner's right of access to the courts and therefore must be struck down. Specifically, petitioner asserts that the President has no explicit power to define the jurisdiction of the lower federal courts and that, consequently, the President's actions which withdraw these claims from their jurisdiction should not be given effect. (Pet. Brief at 15-16).

This argument fails on the same underlying logical fallacy that permeates petitioner's entire argument: the false identification of the power to settle claims with the power to determine sovereign immunity. For example, petitioner describes earlier sovereign immunity determinations as the Executive's "use of private claims" (Pet. Brief at 20), but fails to recognize that, by suggesting sovereign immunity, the Executive did not so much "use the claims" as he "used the lawsuits." The claims survived.

In this case the President has settled petitioner's claim. The Executive by its action has not indicated any position or attempted to exert any authority with respect to the sovereign immunity of the Government of Iran. Although both powers have some effect on the continued viability of petitioner's lawsuit,[5] the two powers are distinct and should not be confused by the fact that Congress, in enacting the FSIA, provided the lower federal courts with jurisdiction to hear suits in which a sovereign was not entitled to immunity.

Petitioner's argument, if accepted, would have required courts prior to the FSIA's enactment to reject as an encroachment on their jurisdiction the Executive's determination of a foreign state's sovereign immunity. In those suits in which the Executive formerly made suggestions of immunity, relying on his inherent foreign policy authority (voluntarily relinquished when the Executive sponsored the FSIA), the courts otherwise would have held that subject matter and *in rem* jurisdiction existed.[6] The President's binding determination that a foreign entity was entitled to immunity limited the jurisdiction of the courts in the sense that the suit was required to be dismissed. But no court found that such a "limitation" was contrary to the dictates of the Constitution or that it arrogated to the President a power solely within the discretion of Congress.

The distinction between jurisdiction and questions of sovereign immunity, like the distinction between questions of sovereign immunity and the settlement of claims, was perceived by Congress. Before the FSIA, Congress had already given the

---

[5] Even if petitioner's summary judgment is not vacated on the basis that its claim has been settled, the district court will be required to do so because the judgment was based on the erroneous legal conclusion that the Government of Iran had waived its immunity to suit.

[6] There would have been no need for the United States to file such a suggestion if a case were subject to dismissal.

lower federal courts diversity jurisdiction in actions involving foreign states. 28 U.S.C. §1332(a)(2),(3) (1976). By enacting section 1330, Congress did not intend to expand the grant of diversity jurisdiction, but rather sought to incorporate into that grant the sovereign immunity doctrine:

> Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. *Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous.* The amendment deletes references to "foreign states" now found in paragraphs (2) and (3) of 28 U.S.C. 1332(a) . . . .

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6613 ("FSIA House Report") (emphasis added). Congress did not confuse the grant of diversity jurisdiction, which was already available, with the sovereign immunity doctrine. Rather, the grant of jurisdiction was refined to make clear that where immunity was to be accorded, the court should immediately dismiss the action without intervention of the Executive. At the Executive's request, Congress acted only to place before the judiciary a rule for decision for those occasions on which a foreign entity would not be entitled to immunity under 28 U.S.C. §1604:

> A principal purpose of this bill is to transfer *the determination of sovereign immunity* from the executive branch to the judicial branch, thereby reducing the foreign policy implications of *immunity* determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

FSIA House Report at 6606 (emphasis added) (quoted without emphasis in Pet. Brief at 10-11). Petitioner agreed:

"[T]he legislative history is replete with statements . . . emphasizing the . . . need to strip from the Executive the authority to terminate pending litigation *through invocation of the immunity doctrine.*" (Pet. Brief at 11) (emphasis added). The FSIA "deals *solely* with sovereign immunity." FSIA House Report at 6606 (emphasis added).

If the FSIA cannot be interpreted as a congressional comment on the President's practice of settling claims of United States citizens—and it cannot—the President's authority does not lie within the third category of presidential authority, as claimed by petitioner.[7]

Assuming that Congress has not addressed the authority of the President to settle petitioner's claim, petitioner argues that this action nonetheless constitutes an "abrogation of [petitioner's] statutory rights of access to the courts of this country . . . ." (Pet. Brief at 16), and an "intrusion into the very core of authority the Constitution confers on the other coordinate branches." (Pet. Brief at 21). However, to the extent that the Executive has "abrogated" any right of petitioner for which compensation must be paid, petitioner concedes that the President's actions cannot be invalidated because the question is not ripe for review. (Pet. Brief at 34 n.32).

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[7] Petitioner has cited no other expression of the will of Congress that could be construed as an implicit denial of the President's authority to settle petitioner's claim.

Similarly, it is unclear how the settlement of petitioner's claim can "intrude" into the authority of the other branches of government if Congress has acquiesced in such settlements and if the President has acted with respect to the claim and not with respect to the jurisdiction of the courts. The argument that such an "intrusion" must occur rests, again, on a failure to differentiate between claims settlement and sovereign immunity. Only if the President sought to determine the sovereign immunity of the Iranian defendants in the underlying action, a matter now explicitly reserved to the judiciary and, on that basis, sought to require dismissal of that action, could such an intrusion occur. This the President has not done.[8]

---

[8] The fact that payment for petitioner's claim is to come from an award issued by the arbitral tribunal does not change the fact that petitioner's claim has been settled. When the President has negotiated lump-sum settlement agreements, the Foreign Claims Settlement Commission has made final determinations of the validity of claims and the specific amounts to be paid United States citizens from the lump-sum fund. Like the decisions of the Iran-United States Claims Tribunal, Claims Declaration, Art. IV, §1 (Pet. App. at 32), the decisions of the Commission were not subject to review by any other official, department, agency, or any establishment of the United States, or by any court by mandamus or otherwise. 50 U.S.C. app. §2010 (1976); 22 U.S.C. §1623(h) (1976). It is irrelevant that petitioner's claim must be presented to the Tribunal—the claim was settled on January 19, 1981, and no further proceedings in United States courts are warranted or appropriate.

CONCLUSION

Petitioner's attempts to restrict the Executive's authority to unblock frozen assets and to settle claims of United States nationals against foreign states are unavailing. The judgment below should be affirmed, in addition to the relief set forth in the Government of Iran's brief. (Iran Brief at 50).

Respectively submitted,

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No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

DAMES & MOORE, a partnership,
Petitioner,

v.

DONALD T. REGAN, the Secretary
of the Treasury of the United States
of America, and THE UNITED STATES OF AMERICA,
Respondents,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE ATOMIC ENERGY ORGANIZATION OF
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and
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Intervenor-Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit Before Judgment

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OCTOBER TERM, 1980

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v.

DONALD T. REGAN, ET AL., *Respondents*.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMERICAN BELL INTERNATIONAL INC. AMICUS CURIAE

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To The United States Court of Appeals
For The Ninth Circuit

MOTION OF AMERICAN BELL INTERNATIONAL INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND INTEREST OF THE AMICUS

American Bell International Inc. ("ABII") moves this Court for leave to file the within Brief Amicus Curiae pursuant to Rule 36.3 of the Rules of the Court. On June 15 1981, ABII filed a Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit Before Judgment (*American Bell International Inc. v. Islamic Republic of Iran, et al.*, No. 80-2111), and a Motion For Expedited Consideration And For Consolidation With *Dames & Moore v. Donald T. Regan, The*

Secretary of the Treasury of the United States of America, and the United States of America, No. 80-2078, *cert. granted,* June 11, 1981. Petitioner's brief on the merits in *Dames & Moore,* and, therefore, ABII's Brief Amicus Curiae is due today, June 19, 1981. ABII's Petition and Motion are still pending.

That ABII has an interest in the subject matter of *Dames & Moore* is obvious. It filed suit against Iran in the United States District Court for the District of Columbia for breach of contract, and it attached $69.6 million of Iran's remainder interest in the Foreign Military Sales Fund.[1]

What may be less obvious, however, are the differences between ABII's case and *Dames & Moore,* and it is the differences rather than the similarities that prompt ABII to file a Brief Amicus Curiae.

In contrast to petitioner in *Dames & Moore,* ABII makes no assault on the President's authority to settle international claims between U.S. nationals and foreign states, nor does ABII challenge the President's authority to nullify attachments and terminate litigation when he provides meaningful alternative relief for U.S. claimants.

For most United States claimants whose attachments have been nullified, the President has provided meaningful alternative relief in the form of access to the Iran-U.S. Claims Tribunal established by agreement between the United States and Iran. That Tribunal has jurisdiction generally to decide commercial claims of U.S. nationals against Iran. It does not have jurisdiction over claims arising under a "binding" contract providing that

[1]On June 11, 1981, the district court ordered that ABII's attachment be vacated on the ground that its case was controlled by *American International Group, Inc. v. Islamic Republic of Iran* (D.C. Cir. June 5, 1981) (slip op.). The district court's order vacating ABII's attachment is currently stayed.

any disputes arising thereunder "shall be within the sole jurisdiction of the competent Iranian courts . . . ." Pet. App. 103a.[2]

Many contracts in dispute between U.S. nationals and Iran have settlement provisions that do not mention the courts of Iran. As to these, there is no question of the Tribunal's jurisdiction. Many U.S. claimants have contracts providing for arbitration or a similar procedure prior to judicial resolution in the Iranian courts. Dames & Moore is an example. The United States takes the position that claims arising under these contracts can also be heard by the Tribunal. United States Statement of Interest, p. 25, filed February 26, 1981, in district courts in which Iran cases were pending ("Statement of Interest").

ABII's contract, however, and the contracts of several other claimants, provide for the settlement of disputes solely by reference to the competent courts of Iran. It can be argued that such contracts are no longer "binding" because of changed circumstances, and should not, therefore, preclude jurisdiction by the Tribunal. The United States will support this argument, *id.* at 25, but no one can predict what the Tribunal will do with respect to jurisdiction. In light of the forum selection language of its contracts, ABII must reasonably assume at this point, and we believe the Court should as well, that the Tribunal lacks jurisdiction over its claims against Iran.

In the conduct of foreign relations, the President has many times settled claims against foreign states by remitting U.S. claimants to international arbitration or by lump sum settlements. The President's exercise of this power, however, is clearly circumscribed by constitutional provisions, *e.g., Reid v. Covert,* 354 U.S. 1 (1957), as well as by

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[2]Even though ABII is an amicus, for convenience it cites to its Appendix to Petition for Writ of Certiorari Before Judgment.

congressional action within the "zone of twilight in which [the President] and Congress have concurrent authority". *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 636 (1952) (Jackson, J., concurring). As to claimants remitted to the Iran-U.S. Claims Tribunal the President may properly have exercised his statutory and inherent powers. As to claimants likely to be excluded from the Tribunal, however, he has exceeded his authority.

ABII files this Brief Amicus Curiae to put the issue of presidential power in full perspective. We believe that this Court can and should distinguish between claimants who will have access to the Tribunal and those who in all likelihood will not. A holding by this Court that the President may nullify an attachment, transfer the attached property to Iran, and afford no alternative relief for the American creditor would have far more serious consequences than a more limited holding that conditions the President's emergency economic powers on the availability of alternative relief.

Respectfully submitted,

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TABLE OF CONTENTS

Page

Table of Authorities vii

Interest of Amicus 1

Summary of Argument 1

Argument 6

I. THE PRESIDENT IS NOT AUTHORIZED TO NULLIFY THE ATTACHMENT OF AN EXCLUDED CLAIMANT WITHOUT PROVIDING A MEANINGFUL ALTERNATIVE REMEDY 6

A. The International Emergency Economic Powers Act Does Not Authorize the President to Nullify Attachments When He Has Not Provided An Alternative Remedy 6

1. IEEPA was enacted to restrict the President's authority 6

2. The President's actions as to excluded claimants are inconsistent with the purposes of IEEPA and with precedents of this Court 7

3. IEEPA does not authorize the nullification of attachments when no alternative relief is provided 11

4. The Foreign Sovereign Immunities Act denies to the President authority to nullify attachments obtained pursuant thereto 13

B. The Hostage Release Act Does Not Authorize The President To Nullify Attachments 15

C. The President Lacks Inherent Constitutional Authority To Nullify Attachments Without Providing An Alternative Remedy 16

II. THE NULLIFICATION OF THE ATTACHMENTS OF EXCLUDED CLAIMANTS CONSTITUTES A TAKING IN VIOLATION OF THE FIFTH AMENDMENT 19

A. The Attachments Are A Property Interest 20

B. The Nullification Of The Attachments Of Excluded Claimants Constitutes An Unlawful Taking 24

TABLE OF AUTHORITIES

Cases	Page(s)
Agee v. Muskie, 629 F.2d 80 (D.C. Cir.), *cert. granted*, 101 S.Ct. 69 (1980)	16
American International Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir. June 5, 1981) (slip op.)	*passim*
Armstrong v. United States, 364 U.S. 40 (1960)	4, 20, 24
Arnett v. Kennedy, 416 U.S. 134 (1974)	21
Blagge v. Balch, 162 U.S. 439 (1896)	20
Board of Regents v. Roth, 408 U.S. 564 (1972)	21, 22
Brown v. J. P. Morgan & Co., 177 Misc. 626, 31 N.Y.S.2d 323 (Sup.Ct. 1941), *rev'd on other grounds*, 265 A.D. 631, 40 N.Y. S.2d 229 (1943), *aff'd* 295 N.Y. 867, 67 N.E.2d 263 (1946)	8
Charles T. Main International, Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir. May 22, 1981) (typescript opinion)	9, 11, 17
Cherokee Nation v. Southern Kansas R.R. Co., 135 U.S. 641 (1890)	24
Cities Service Co. v. McGrath, 342 U.S. 330 (1952)	5, 26, 27
Gray v. United States, 21 Ct. Cl. 340 (1886)	20
Guessefeldt v. McGrath, 342 U.S. 308 (1952)	2, 8

Hughes Aircraft Co. v. United States,
534 F.2d 889 (Ct. Cl. 1976) 25

In re Hoops,
3 B.R. 635 (D. Colo. 1980) 20

Louisville Joint Stock Land Bank
v. Radford, 295 U.S. 555 (1935) 20

Nielsen v. Secretary of Treasury,
424 F.2d 833 (D.C. Cir. 1970) 8

Orvis v. Brownell,
345 U.S. 183 (1953) ..... *passim*

Orvis v. McGrath,
198 F.2d 708 (2d. Cir.), *aff'd sub nom.*
Orvis v. Brownell, 345 U.S. 183 (1953) 9

Perry v. Sindermann,
408 U.S. 593 (1972) 21-22

Posadas v. National City Bank,
296 U.S. 497 (1936) 15

Propper v. Clark,
337 U.S. 472 (1949) 8

Redpath v. Kissinger,
415 F.Supp. 566 (W.D. Tex.), *aff'd* 545 F.2d
167 (5th Cir. 1976) 16

Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 5, 24, 26

Reid v. Covert,
354 U.S. 1 (1957) 4, 19

Rich v. Naviera Vacuba, S.A.,
197 F. Supp. 710 (E.D. Va.),
aff'd 295 F.2d 24 (4th Cir. 1961) 11, 18

Richardson v. Simon,
560 F.2d 500 (2d Cir. 1977), *appeal dismissed, Richardson v. Blumenthal*,
435 U.S. 939 (1978) 8

Seery v. United States,
127 F. Supp. 601 (Ct. Cl. 1955) 19

Silver v. New York Stock Exchange,
373 U.S. 341 (1963) 15

United States v. Belmont,
301 U.S. 324 (1937) 3, 17

United States v. Fuller,
409 U.S. 488 (1973) 5, 23

United States v. Guy W. Capps, Inc.
204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) 19

United States v. Pink,
315 U.S. 203 (1942) 3, 17-18

United States v. The Schooner Peggy,
5 U.S. (1 Cranch) 103 (1801) 19-20

Victory Transport, Inc. v. Comisaria General,
336 F.2d 354 (2d Cir.), *cert. denied*,
381 U.S. 934 (1965) 11, 18

Ware v. Hylton,
3 U.S. (3 Dall.) 199 (1796) 4, 19

Worthy v. Herter,
270 F.2d 905 (D.C. Cir.), *cert. denied*,
361 U.S. 918 (1959) 15-16

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 15, 18

Zemel v. Rusk,
381 U.S. 1 (1965) 16

Zittman v. McGrath,
341 U.S. 446 (1951) 2, 10, 11, 12, 21

Zittman v. McGrath,
341 U.S. 471 (1951) 8

Constitutional Provisions, Statutes, Regulations, and Executive Agreements

Constitution of the United States
Amendment 5 ..... 24, 25

International Emergency Economic Powers Act,
50 U.S.C. §§ 1701-1706 (Supp. 1980) ..... *passim*

Trading With the Enemy Act, 50 U.S.C. app. §§ 1-44
(1968 & Supp. 1980) ..... *passim*

Foreign Sovereign Immunities Act of 1976,
28 U.S.C. §§ 1330, 1602-1611 (1976) ..... *passim*

Arms Export Control Act,
22 U.S.C. § 2751 (1979) 23

22 U.S.C. § 1732 15

28 U.S.C. § 1502 ..... 5, 25

D.C. Code Ann. § 16-501 (1973) 13

31 C.F.R. § 535.805
(46 Fed. Reg. 66834) 20

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims By the Government of the United States of America and the Government of the Islamic Republic of Iran 25

Miscellaneous

46 Cong. Globe, 40th Cong. 2d. Sess., 1796, 4207, 4211, 4212, 4232 (1868) 16

L. Henkin, Foreign Affairs and the Constitution (1972) 18

H.R. Rep. No. 95-459, 95th Cong., 1st Sess. (1977) 6

H.R. Rep. No. 94-1487, 94th Cong., 2d. Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News. 6604 ..... 13-14, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2078

DAMES & MOORE, a Partnership, *Petitioner,*

v.

DONALD T. REGAN, ET AL., *Respondents.*

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF OF AMERICAN BELL INTERNATIONAL INC. AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of American Bell International Inc. ("ABII") as amicus curiae is set forth in the Motion of ABII for Leave to File Brief Amicus Curiae, pp. i-iv, *supra.*

SUMMARY OF ARGUMENT

A. The International Emergency Economic Powers Act does not authorize the President to nullify attachments when he provides no alternative relief for U.S. claimants. That Act was enacted in 1977 to curtail the economic powers previously exercisable by the President in peacetime under the Trading With the Enemy Act. In IEEPA Congress reenacted the President's TWEA power

to freeze assets but denied to the President the power to vest assets in peacetime. Both Acts empower the President to protect the interests of U.S. claimants by preserving foreign assets to satisfy claims, power used in this case for the benefit of many, but not all claimants.

As to claimants who are unlikely to be able to present claims to the Tribunal – the excluded claimants – the President has invoked his IEEPA powers to nullify attachments, transfer the attached assets to Iran, and leave claimants with no means of enforcing a claim against Iran. That result is contrary to the precedents of this Court. *Orvis v. Brownell*, 345 U.S. 183 (1953), and *Zittman v. McGrath*, 341 U.S. 446 (1951), hold that an attachment obtained during a freeze is nonetheless valid in determining relationships between the American creditor and the foreign debtor (Iran). *Zittman* holds that an Alien Property Custodian standing in the shoes of an enemy debtor cannot defeat an attachment even when he vests the debtor's interest in the property; *Orvis* permitted the Custodian to vest, free of an attachment. Neither case, however, would permit the result sought by the President in this case under the more limited powers of IEEPA.

The United States argues that the plain language of IEEPA authorizes the President to nullify attachments. This Court has counseled against the literal application of that language. *Guessefeldt v. McGrath*, 342 U.S. 301, 319 (1952). Moreover, the argument proves too much. The language of IEEPA is so broad that it would authorize virtually any presidential action during a national emergency with respect to foreign assets, even the power to vest which IEEPA specifically denies to the President. The scope of the President's power under IEEPA must be determined by reference to the purposes of that

legislation and of its predecessor, TWEA. Those Acts were designed to deny to a hostile foreign state the use of its assets, to preserve foreign assets for the benefit of United States creditors, and to insure an equitable distribution of such assets among creditors. When the President provides alternative remedies for United States claimants through an international claims program, in this case through the arbitration procedures of the Iran-U.S. Claims Tribunal, he acts consistently with the statutory objectives. When he nullifies the attachments of claimants who are excluded from the Tribunal, he exceeds his statutory authority.

The nullification of attachments by Presidential fiat is also inconsistent with the Foreign Sovereign Immunities Act, which vests in the courts responsibility for determining when foreign states are subject to suit and when their assets may be attached. It does not offend against the FSIA temporarily to prevent execution on an attachment by freezing assets. The President's actions here, however, permanently place foreign assets beyond the reach of U.S. claimants excluded from the Tribunal and thus have the same effect as a suggestion of immunity: the decision to insulate foreign assets from U.S. claimants is being taken for foreign policy rather than judicial reasons, and it is being made by the President rather than the courts. This contravenes the FSIA.

The President also has no inherent constitutional authority to nullify attachments, particularly in light of the FSIA. Neither *United States v. Belmont*, 301 U.S. 324 (1937), nor *United States v. Pink*, 315 U.S. 203 (1942), the cases relied on by the United States, authorizes the actions taken here; neither case involves the constitutional rights of U.S. nationals. The President has long exercised the authority to enter into claims settlement agreements with

foreign states, frequently through executive agreement. Whatever may be the extent of the President's inherent authority to affect judicial process when remitting U.S. claimants to alternative forums such as binding international arbitration, he cannot claim such authority as to claimants who will not have access to the alternative procedures agreed upon. Executive agreements entered into for foreign policy reasons may not defeat constitutional rights and cannot create presidential power. *Reid v. Covert*, 354 U.S. 1 (1957).

B. The nullification of the attachments of excluded claimants is also a taking in violation of the Fifth Amendment. The courts have long recognized a right to compensation when property is taken or sacrificed to achieve foreign policy objectives. *E.g., Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). The nullification of the attachments of excluded claimants is an unlawful taking for Fifth Amendment purposes because, first, the attachments constitute a property interest that was taken, and second, such claimants do not now have a reasonably certain prospect of obtaining compensation.

An attachment is a property interest within the meaning of the Fifth Amendment. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 46 (1960). The Court of Appeals in *American International Group, Inc. v. Islamic Republic of Iran*, No. 80-1779 (D.C. Cir. June 5, 1981) (slip op.) ("*AIG*"), however, held that attachments of Iranian property obtained during the freeze were not property capable of being taken because the license permitting attachments was revocable; attaching claimants had no reasonable expectation that their attachments would remain valid. Claimants did however have a reasonable expectation, based on precedents of this Court and prior history, that their attachments would create valid property interests vis-

a-vis Iran. They also had the reasonable expectation that, if their attachments were defeated by further action of the President, they would nonetheless be given alternative relief against frozen Iranian assets.

It is also erroneous to analogize the nullification of the attachments to the revocation of property licenses issued by the United States with respect to public lands. *See, e.g., United States v. Fuller,* 409 U.S. 488 (1973). A license to graze on public land is essentially a leasehold interest issued by an owner entitled to exercise dominion over the leasehold. Attachments are creatures of state law. IEEPA permits the President to regulate attachments and other property interests for specific purposes. Claimants had no reason to expect that the President would extinguish their pre-existing rights to seek recovery from the attached foreign assets.

The Government's nullification of the attachments of excluded claimants constitutes a taking because they have no reasonable prospect of compensation. Access to the Iran-U.S. Claims Tribunal would constitute compensation for the taking of the attachment, but excluded claimants are unlikely to have such access. Because 28 U.S.C. § 1502 denies the Court of Claims jurisdiction of claims that arise from or are dependent on a treaty, that Court may not have jurisdiction of a claim for compensation. This Court can meet the Fifth Amendment claim by holding that 28 U.S.C. § 1502 will not bar Court of Claims jurisdiction, but that holding must be made now, not in the future. *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974); *Cities Service Co. v. McGrath,* 342 U.S. 330 (1952).

ARGUMENT

I. THE PRESIDENT IS NOT AUTHORIZED TO NULLIFY THE ATTACHMENT OF AN EXCLUDED CLAIMANT WITHOUT PROVIDING A MEANINGFUL ALTERNATIVE REMEDY.

A. The International Emergency Economic Powers Act Does Not Authorize the President to Nullify Attachments When He Has Not Provided An Alternative Remedy.

1. IEEPA was enacted to restrict the President's authority.

This case calls upon the Court to define the extent of traditional presidential powers to freeze and regulate foreign assets in an international emergency in the light of expressed congressional dissatisfaction with the manner in which those powers have previously been exercised. It is a case of first impression.

Congress enacted IEEPA in 1977 specifically to curtail emergency powers previously exercisable in peacetime by the President under the Trading with the Enemy Act, 50 U.S.C. app. §§ 1-44 (1968 & Supp. 1980) ("TWEA"). Section 5(b) of TWEA had conferred on the President the powers, exercisable in wartime or during a national emergency, to freeze and to vest foreign assets. Congress believed that Section 5(b) had become "essentially an unlimited grant of authority for the President. . . ." H.R. Rep. No. 459, 95th Cong., 1st Sess. 7 (1977). IEEPA reenacts the freezing power of TWEA, but it tightens the definition and limits the duration of a declared national

emergency, 50 U.S.C. §§ 1701(b), 1706(b), and more important, it denies the President the power to vest in peacetime.

2. The President's actions as to excluded claimants are inconsistent with the purposes of IEEPA and with precedents of this Court.

IEEPA authorizes the President to:

> [I]nvestigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or national thereof has any interest . . . . 50 U.S.C. § 1702(a)(1)(B) (Supp. 1980).

Although the United States argues that the plain language of IEEPA authorizes the President to nullify attachments, United States Statement of Interest, filed Feb. 26, 1981, in the district courts ("Statement of Interest") at 28-29, this Court has counseled against "literalness of application."[1]

> The concern of the Trading with the Enemy Act is with problems at once complicated and far-

[1] The language of IEEPA would encompass virtually any presidential action taken during a national emergency with respect to property in which a foreign state has an interest. Read literally, the President's authority under IEEPA to "direct and compel . . . any transfer" of property would authorize a directed transfer of property to the Attorney General, a vesting, even though IEEPA was enacted to deny the President authority to vest in peacetime.

> reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes. *Guessefeldt v. McGrath,* 342 U.S. 308, 319 (1952).[2]

This Court has held that TWEA was designed to prevent the transfer of foreign assets in the United States to hostile foreign nations, to secure those assets for the benefit of American creditors, and to provide an equitable method of distributing foreign assets among American creditors. *Zittman v. McGrath,* 341 U.S. 471, 473-74 (1951); *Propper v. Clark,* 337 U.S. 472, 481, 484 (1949); *see Richardson v. Simon,* 560 F.2d 500 (2d Cir. 1977), *appeal dismissed sub nom., Richardson v. Blumenthal,* 435 U.S. 939 (1978); *Nielsen v. Secretary of Treasury,* 424 F.2d 833 (D.C. Cir. 1970). No case has permitted the President to nullify an attachment of foreign assets obtained by an American creditor in order to transfer the attached assets to a foreign state beyond the reach of U.S. judicial process, and thus to deprive the American creditor of any meaningful remedy.

In upholding the President's authority to nullify attachments under IEEPA, the Government and the Courts of Appeals for the First and District of Columbia Circuits rely almost exclusively on *Orvis v. Brownell,* 345 U.S. 183 (1953). The Government finds *Orvis* "particularly com-

[2] *See also Brown v. J.P. Morgan & Co.,* 31 N.Y.S.2d 323, 333-34 (Sup. Ct. 1941), *rev'd on other grounds,* 265 A.D. 631, 40 N.Y.S.2d 229 (1943), *aff'd,* 295 N.Y. 967 (1946):

> While the language of the executive order [issued under TWEA] is broad and savors of an all-inclusive interdiction, nonetheless the range of its application is to be viewed and measured in the light of its obvious intent. . . .

pelling" in confirming the President's authority. Statement of Interest at 34.

In *Orvis*, petitioners obtained an attachment against Japanese assets in a New York State court after the assets had been frozen.[3] Subsequently, the Alien Property Custodian vested the assets. Orvis sued the Custodian under Section 9(a)[4] of TWEA, claiming that the attachment prevailed over the Custodian's power to vest. This Court held that the Custodian could vest the property free of the attachment. *Orvis v. Brownell*, 345 U.S. at 188. It did not hold that frozen assets could be returned to the foreign debtor free of a domestic creditor's attachment; the respective property interests of the U.S. claimant and the enemy debtor were not at issue in *Orvis*. This Court was careful to hold that the freezing order did not disturb "attachment liens insofar as they determined relationships between creditor and enemy debtor . . . ." 345 U.S. at 186-87. *Orvis* holds only that the Custodian's statutory vesting power creates an interest in the assets superior to the attachment creditor, thus ensuring that the assets are applied equitably for the benefit of all U.S. creditors.

The Government's analysis of *Orvis*, and that of the Courts of Appeals for the First and District of Columbia Circuits, *see Charles T. Main International, Inc. v. Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981) (typescript opinion) ("*Main*"); *AIG*, mistakenly proceed on the assumption that the power at issue in *Orvis* is the President's freezing power. The freez-

[3] Although a license for the attachment was required, no license was in fact sought, a fact noted by this Court, 345 U.S. at 185, 189, and discussed in Judge Frank's opinion in the court below. *Orvis v. McGrath*, 198 F.2d 708 (2nd Cir. 1952).

[4] Section 9(a) permits a person other than an enemy to recover an interest in property vested by the Custodian. Pet. App. 28a-31a.

ing order in *Orvis* simply prevented a "transfer" of the foreign assets, so that petitioner could not perfect a property interest that would survive vesting. The Court's holding, however, deals primarily with the Custodian's statutory power to vest. The Court upholds the Custodian's title as against the attachment, a title acquired by vesting. *Orvis* does not define the scope of the President's authority absent vesting, the issue before the Court now. The United States argues in this case that IEEPA alone authorizes what in *Orvis* could be accomplished only by vesting.

In *Zittman v. McGrath*, 341 U.S. 446 (1951), the plaintiff-creditors attached blocked deposits of German banks in the United States. The Custodian issued an order by which he sought to vest the "right, title, and interest" of the German banks. "He has, in short, put himself in the shoes of the German banks." 341 U.S. at 463. To obtain the assets free of the attachment lien, the Custodian argued that a post-freezing order attachment was null and void, not only as against the Custodian's power to vest, but as against the German debtor. "[H]e takes the position that no valid rights against the German debtors were acquired by the attachments because prohibited by the freezing program." *Id.* The Custodian in *Zittman* thus took the same position that the United States takes in this case: that a post-freeze attachment does not establish a property interest as against the enemy debtor, Germany in *Zittman* and Iran in this case. This Court rejected that position.

> As against the German debtors, the attachments and the judgments they secure are valid under New York law, and cannot be cancelled or annulled under a vesting Order by which the Custodian takes over only the right, title, and interest

of those debtors in the accounts. 341 U.S. at 463-64.

In this case the United States asks the Court to sanction under IEEPA the cancellation of an attachment that it refused to permit under TWEA.

The Court of Appeals in *AIG* reads *Orvis* and *Zittman* as indicating that this Court "would not give the attachments any effect as against a federal interest", slip op. at 21-22, and therefore concludes that the attachments should not be given effect as against the United States interest in resolving the Iran crisis. No abstract "federal interest", however, was at issue in *Orvis* and *Zittman;* this Court was construing the extent of the Custodian's power to vest, not upholding a foreign policy interest.

3. IEEPA does not authorize the nullification of attachments when no alternative relief is provided.

IEEPA, like TWEA, is intended to protect the interests of U.S. claimants. The resolution of disputed claims against foreign states, through claims settlement arrangements, is a traditional means of protecting these interests. The President has entered into claims settlements with other countries numerous times in the past 200 years, by providing for international arbitration or accepting lump sum payments. *See* Statement of Interest at 12n**, 13n*. It may be reasonable to read into IEEPA implied authority to nullify attachments for claimants remitted to a claims settlement program. Nothing in the language of IEEPA permits this expansion of presidential power, but it reconciles difficult competing interests and provides a solution consistent with past practice and with the statutory purpose of IEEPA.

The United States has emphasized to this Court the importance of access to the Tribunal in defending the President's authority to nullify attachments:

> The First and District of Columbia Circuit opinions also amply sustain the power of the President to settle claims against Iran *by providing for arbitration of those claims.* . . . Hence the President has provided a reasonable and fully adequate means for resolving claims against Iran and, *consistent with the purposes of IEEPA, has assured the presence of funds to pay arbitration awards out of the Iranian assets that were frozen on November 14, 1979.* Memorandum for Respondents in Response on Petition for a Writ of Certiorari Before Judgment at pp. 11-12, *Dames & Moore v. Regan,* No. 80-2078 (emphasis added). *See also* Statement of Interest at 28.

Similarly, in distinguishing the Iranian cases from *Zittman,* the D.C. Circuit in *AIG* said:

> United States policy is perfectly consistent: it seeks to resolve a difficult foreign crisis and safeguards certain legitimate claims of Americans not by, as in *Zittman,* denying a forum, but by remitting the claimants to international arbitration. *AIG,* slip op. at 21.

Whatever the merits of the court's reasoning in that case, which did not involve claims that were not arbitrable, *AIG,* slip op. at 13 n.4, it does not apply to excluded claimants, who have not been remitted to international arbitration.

The nullification of attachments obviously has far different consequences for claimants who are excluded from

the Tribunal than it does for claimants who are not. If the President's actions are sustained, it is at least arguable that for claimants who have access to the Iran-U.S. Claims Tribunal the statutory purposes of IEEPA are met. Claimants who are excluded from the Tribunal will have no practical means to enforce a judgment against Iran. They will have neither the benefits secured by their prior attachments nor access to the Tribunal. The effect of the President's actions with respect to these claimants is contrary to the statutory purposes of TWEA and IEEPA.

4. The Foreign Sovereign Immunities Act denies to the President authority to nullify attachments obtained pursuant thereto.

The President's nullification of attachments also contravenes the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. Pet. App. at 35a, 38a. ABII's writ of attachment, for example, was issued under local law, D.C. Code Ann. § 16-501 (1973), but jurisdiction for the attachment is conferred by FSIA. That Act vests in the courts the responsibility for determining when private claims may be asserted against foreign states and when attachments may issue against the assets of foreign states to secure judgments. 28 U.S.C. § 1602. Pet. App. at 38a.

The legislative history shows clearly that Congress wanted issues of immunity – under what circumstances U.S. claimants could sue foreign states and enforce judgments – decided on statutory, legal grounds, not on the basis of foreign policy considerations.

> A principle purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring

> litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 7, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6606 ("FSIA House Report").

Congress likewise provided American claimants with an effective means for enforcing commercial claims by authorizing execution upon foreign assets:

> [T]he bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. [FSIA] seeks to restrict this broad immunity from execution. It would conform the execution immunity rules more closely to the jurisdiction immunity rules. FSIA House Report at 8.

The legislative history of FSIA also reveals Congress' intent that claimants would not be denied an enforceable remedy against foreign governments by a subsequent executive agreement. Sections 1604 and 1609 of FSIA make jurisdiction over claims against foreign sovereigns subject to "*existing* international agreements to which the United States [was] a party at the time of enactment . . . ." (Emphasis added.) An earlier version would have extended this exemption to "future" agreements. The House rejected this extension on the ground that it was "best to eliminate any possible question that this language might be construed to authorize a future international agreement"

denying American claimants a remedy against foreign governments. FSIA House Report at 10.

In light of FSIA, the Executive Branch can no longer argue, as it does, Statement of Interest at 17, that all foreign claims are contingent and may be cancelled by the President in furtherance of political objectives. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579,637-38 (1952) (Jackson, J., concurring). The President's nullification of attachments contravenes the requirement of FSIA that commercial claimants be accorded statutory and judicially determined remedies against aforeign government, free from political interference.

Construed properly, IEEPA is not inconsistent with FSIA. Freezing foreign assets pursuant to IEEPA does not itself conflict with FSIA because it effects no permanent disposition of foreign assets. What offends against FSIA is not a freeze designed to preserve the status quo but a scheme designed to immunize foreign assets from the remedies provided by FSIA, a scheme implemented in this case by nullifying attachments and directing the return of attached property to Iran. Construed to permit such immunization, FSIA and IEEPA would be inconsistent. Repeal by implication is not favored. *See, e.g., Silver v. New York Stock Exchange,* 373 U.S. 341, 357 (1963); *Posadas v. National City Bank,* 296 U.S. 497, 503 (1936).

B. The Hostage Release Act Does Not Authorize The President To Nullify Attachments.

The Hostage Release Act of 1868, 22 U.S.C. § 1732 (1979), does not provide independent statutory authority for the nullification of attachments. This statute has been held to authorize the use of presidential "diplomatic" and "foreign-service consular" powers. *Worthy v. Herter,* 270

F.2d 905, 910 (D.C. Cir.), *cert.denied,* 361 U.S. 918 (1959). *See generally Zemel v. Rusk,* 381 U.S. 1 (1965) (refusal to validate passport); *Agee v. Muskie,* 629 F.2d 80 (D.C. Cir.), *cert. granted,* 101 S. Ct. 69 (1980) (passport revocation); *Redpath v. Kissinger,* 415 F.Supp. 566 (W.D. Tex.), *aff'd* 545 F.2d 167 (5th Cir. 1976) (imposition of a travel ban). Judge McGowan's separate opinion in *AIG* holds that the Act authorizes the suspension of U.S. claims against a foreign government, but does not reach the question whether it also authorizes the nullification of attachments.

Congress enacted the Hostage Release Act to address the involuntary repatriation of naturalized American citizens visiting Europe, and British arrests of Americans for alleged complicity in the Fenian cause in Ireland. 46 Cong. Globe, 40th Cong., 2d Sess. 1796, 4207, 4211-4212, 4232 (1868). *See AIG* (Mikva, J., separate slip op. at 1). Congress used broad language to assure the President of congressional support in resolving those two crises, not to give the President plenary authority to resolve any dispute involving "any violation of the rights of American citizenship."

We agree with Judge Mikva that the "Act is too dangerous a reed to provide independent support for actions whose consequences are primarily domestic." (Mikva, J., separate slip op. at 3.)

C. The President Lacks Inherent Constitutional Authority To Nullify Attachments Without Providing An Alternative Remedy.

The United States relies on the President's authority to enter into international claims settlement programs as authority for the nullification of attachments. Statement of Interest at 26. Whatever may be the force of that argument as to claimants who are included in a claims pro-

gram, it is clearly inapplicable to claimants who are not. The President does not have inherent authority to nullify attachments and leave excluded claimants with no alternative remedy against Iran.

Neither the First Circuit in *Main* nor the District of Columbia Circuit in *AIG* addressed the President's inherent authority to nullify attachments, since both Courts of Appeals believed that the President had statutory authority to act. They did, however, consider the President's inherent authority to suspend claims.[5] Both Circuits regarded the availability of binding arbitration as essential in upholding the President's inherent authority to suspend and ultimately terminate claims against Iran. *Main*, slip op. at 22; *AIG*, slip op. at 25.

United States v. Belmont, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), the primary cases on which the United States relies in its Statement of Interest, do not support its position. In neither case were claims of U.S. nationals at stake. *Belmont* holds only that the President may constitutionally give effect to Soviet decrees confiscating the property of Soviet citizens. In *Pink*, the New York Superintendent of Insurance wanted to use funds deposited by the New York branch of a Russian insurance company to discharge claims against the insurance company arising abroad and held by foreign claimants. The United States asserted the right to apply the funds to its general claims against the Soviet Union and the general claims of U.S. nationals. This Court held:

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[5]Both Courts of Appeals rejected the position of the concurring judge in *Main* that IEEPA authorized the suspension of claims. *AIG*, slip op. at 26 n.15; *Main*, slip op. at 13-14 & n.13; *cf. Main*, slip op. at 1 (Breyer, J., concurring).

> [T]he Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such [foreign] creditors. 315 U.S. at 228.

In foreign affairs, the Executive and Legislative Branches share responsibility. The President's historic dominance over foreign affairs has been the product of congressional restraint.[6] Prior to the enactment of FSIA, it was at least arguable that the President had plenary authority to deal with claims asserted in U.S. courts against foreign states, and attachments obtained therein. Acting through suggestions of immunity, the President could defeat the effort of a U.S. claimant to obtain jurisdiction or to enforce a judgment.[7] As noted, enactment of FSIA placed in the courts, rather than the President, responsibility for determining under what conditions foreign states may be sued in U.S. courts, and their property attached. The President may no longer claim inherent authority to nullify ABII's attachment. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 636-37 (Jackson, J., concurring).

The United States argues that nullification of attachments "was an essential part of the agreement" with

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[6]One constitutional scholar has noted:

> The courts, we have seen, have recognized the authority of the President to direct them in regard to sovereign and diplomatic immunity, some thought also in Act of State, subjects which are also proper subjects for Congressional legislation.

L. Henkin, Foreign Affairs and the Constitution 104 (1972).

[7]*See, e.g., Victory Transport Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); *Rich v. Naviera Vacuba, S.A.*, 197 F. Supp. 710 (E.D. Va.), *aff'd* 295 F.2d 24 (4th Cir. 1961).

Iran. Whether or not that is so, it is insufficient in law. An executive agreement, no matter how essential, cannot override constitutional rights or create presidential power. *Reid v. Covert,* 354 U.S. 1 (1957); *Seery v. United States,* 127 F.Supp. 601 (Ct. Cl. 1955); *United States v. Guy W. Capps, Inc.* 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds,* 348 U.S. 296 (1955).

II. THE NULLIFICATION OF THE ATTACHMENTS OF EXCLUDED CLAIMANTS CONSTITUTES A TAKING IN VIOLATION OF THE FIFTH AMENDMENT.

For two hundred years, the courts have recognized a right to compensation when property is taken or sacrificed to achieve U.S. foreign policy objectives. In *Ware v. Hylton,* 3 U.S. (3 Dall.) 199 (1796), a Virginia statute provided that debts owed by Virginia citizens to British creditors could be discharged by payment to the State. A subsequent Peace Treaty with Great Britain reaffirmed debts to British creditors, causing plaintiff to pay the debt twice. The Court held that plaintiff was entitled to seek compensation from the State.

> That congress had the power to sacrifice the rights and interests of private citizens, to secure the safety or prosperity of the public, I have no doubt; but . . . *ample compensation ought to be made to all the debtors who have been injured by the treaty, for the benefit of the public. Id.* at 245 (emphasis added).

Similarly, in *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801), the Court affirmed the power of the

President to restore through treaty a prize ship that had been captured by the officers of an American ship. Nevertheless, the Court stated that this might be a "case proper for compensation." 5 U.S. (1 Cranch) at 110. *See also Blagge v. Balch,* 162 U.S. 439, 455 (1891), *citing Gray v. United States,* 21 Ct. Cl. 343, 392-393 (1886).

The President's order annulling the attachments of excluded claimants is an unlawful taking for Fifth Amendment purposes because, first, the attachment constitutes a property interest that was taken, and, second, such claimants do not presently have a reasonably certain prospect of obtaining compensation.

A. The Attachments Are A Property Interest.

The courts have consistently held that an attachment is a property interest within the meaning of the Fifth Amendment. *See Armstrong v. United States,* 364 U.S. 40, 46 (1960) (government action defeating the plaintiffs' materialmen's liens constitutes a taking under the Fifth Amendment); *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935) (mortgage lien held a property right compensable under the Fifth Amendment). *See also In re Hoops,* 3 B.R. 635, 640 (D. Colo. 1980) ("A lien is a substantive property right for purposes of the Fifth Amendment"). Nevertheless the Court of Appeals in *AIG* held that the President's annulment of the attachments on Iranian property was not a taking because the general license permitting attachments was revocable (like all licenses issued under the Iranian Asset Control Regulations),[8] and thus claimants had no "reasonable expecta-

[8] §535.805 of the Regulations provides:

> The provisions of this part and any rulings, licenses, authorizations, instructions, orders or forms issued thereunder may be amended, modified, or revoked at any time.

tion" that the attachments would remain in force. *AIG, slip op.* at 38.

The D.C. Circuit holding may be appropriate where the holder of the attachment can satisfy his claim in another forum, such as the Iran-U.S. Claims Tribunal. However, for excluded claimants, the nullification of their interests leaves them with nothing.

A licensed attachment of frozen assets may create a property interest even though the Executive retains the power to revoke the license. In both *Orvis* and *Zittman,* the licenses were revocable. Nevertheless, this Court held in both cases that the freeze did not nullify claimant's property interests in the assets vis-a-vis the foreign creditor. *Orvis v. Brownell,* 345 U.S. at 186; *Zittman v. McGrath,* 341 U.S. at 456.

As this Court has noted many times, property interests for Fifth Amendment purposes "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlements to those benefits." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972); *see Arnett v. Kennedy,* 416 U.S. 134 (1974); *Perry v. Sindermann,* 408 U.S. 593 (1972). Whether a property interest is protectable under the Fifth Amendment requires an examination not only of the interest purportedly given by the state, but of the mutual understandings, that have been created upon which reasonable reliance may be placed. In *Perry,* the Court held that a faculty member at a state university could reasonably rely upon an unwritten, "common law" understanding that his employment would continue so long as his services were satisfactory. "A person's interest in a benefit is a 'property' interest for due

process purposes if there are such . . . mutually explicit understandings that support his claim of entitlement to the benefit. . . ." 408 U.S. at 601.

Although *Roth* and *Perry* concerned procedural due process rights, their analyses are relevant to the question of how property interests are created. That the license issued by the Secretary of the Treasury authorizing prejudgment attachments was revocable is the beginning, not the end, of the inquiry.

When the President, citing his authority under IEEPA, authorized prejudgment attachments, he did so in the expectation that creditors would undertake the expense and inconvenience to obtain them for some purpose. The FSIA, IEEPA, the prior experience of international settlements, and the decisions of this Court all gave content to the President's actions and inevitably and designedly created expectations that claimants' access to Iranian funds would be assured.[9] Read together these authorities held out the promise that commercial claims would either be adjudicated in accordance with the rule of law or be resolved through a claims settlement procedure.

The argument of the Court of Appeals in *AIG*, slip op. at 38-39, that no expectations were created by the attachment license, proves too much. The license invited claimants to act upon it; it was issued with the intention and expectation that attachments would be sought. Yet under the Court of Appeals' reasoning, a claimant under-

[9]The President reinforced those expectations by his public statements assuring claimants that their claims would be satisfied from the frozen Iranian funds. Pet. App. 109a, 111a-112a.

taking the expense of obtaining an attachment would reasonably do so without any expectation of benefits.[10]

The Government, Statement of Interest at 38, and the *AIG* Court, slip op. at 38-39, likened the President's nullification of the attachment license to the revocation of property licenses issued by the Government. *See, e.g., United States v. Fuller,* 409 U.S. 488 (1973). This comparison misses the point. *First,* when the Government revokes a license to use land, it does not require the licensee to surrender whatever of value it has obtained; revocation merely interrupts future use. In this case, the President's revocation destroys whatever value the attachment had.

Second, the attachment license is different from the licenses at issue in the grazing and mineral cases. In those cases, the land was owned by the Government from which all rights of access or use devolved. The rights of claimants to attach assets arises from an independent source – state law – and is guaranteed by FSIA. Although the President's license was necessary because he had frozen all Iranian assets, the authority for the attachments was not predicated upon federal power, but upon local law. The President has no authority to issue or to authorize the is-

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[10]In its Statement of Interest filed with the district court, the United States argues that the annulment of the attachment license causes no loss because "the President's actions restored all claimants to their status quo as of November 14, 1979 . . . ." Statement of Interest at 39. The Government reasons that without the freeze, Iran would have withdrawn its assets leaving claimants unable to obtain attachments. Although this argument may tell against some claimants, it does not apply to ABII. ABII attached Iran's remainder interest in the Foreign Military Sales Fund, disposition of which is governed by the Arms Export Control Act, 22 U.S.C. § 2751 (1979). Iran did not have possession or control of this fund on November 14, 1979, and it does not have possession or control today.

suance of writs of attachment; such writs are issued by courts acting under state law. Thus, when the President nullified the attachments, he was acting not simply upon a license that he was authorized to revoke. He was also destroying an interest that derives from an independent body of law. Claimants thus had every reason to expect that the President would not interfere with their right to recovery, an expectation that, under the circumstances, created a compensable property interest.

B. The Nullification Of Attachments Of Excluded Claimants Constitutes An Unlawful Taking.

Because the attachments created a property interest in the Iranian assets, the Government's annulment constitutes a taking. Under the Fifth Amendment the taking is unlawful because excluded claimants have no reasonable prospect for compensation.[11]

A Fifth Amendment taking is unlawful and must be barred unless there is a "reasonable, certain and adequate provision for obtaining compensation." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974), *quoting Cherokee Nation v. Southern Kansas R.R. Co.*, 135 U.S. 641, 659 (1890). The United States anticipates this problem in its Statement of Interest; its answer is that claimants can look to the "establishment of the Iran-U.S. Claims Tribunal", the Tribunal's one billion dollar security account, Iran's obligation to replenish the account, and "the enforceability of the Tribunal's awards in

[11]A taking of a property interest compensable under the Fifth Amendment is complete when the Government destroys the value of the property. *E.g.*, *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

the courts of any nation". Statement of Interest at 20.[12] Access to the Tribunal is adequate compensation for the nullification of attachments, but, obviously, only for claimants before the Tribunal. For excluded claimants, the taking of their attachments will remain uncompensated.

The Government speculates that new Iranian assets "may well" come into this country "based on renewed trade" and be available for attachment. *Id.*, at 39. This hardly rises to a "reasonable, certain and adequate" prospect of compensation. It is also unlikely; the prospect that any new funds will be attached will itself be a strong deterrent against bringing them into the United States.

It is unlikely that excluded claimants can obtain relief in the Court of Claims. 28 U.S.C. § 1502 denies the Court of Claims jurisdiction of "any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations."[13] The United States does not concede that a claim for compensation will be within the jurisdiction of the Court of Claims. Statement of Interest at 21 n.*, *citing* 28 U.S.C. § 1502.

This Court can, of course, moot the Fifth Amendment objection by holding that the Court of Claims will have jurisdiction to hear claims. But that deter-

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[12]Ironically, the Claims Settlement Declaration, which makes Tribunal awards enforceable in the courts of any nations, may create obstacles for those excluded claimants who seek to enforce abroad judgments obtained in U.S. courts. A foreign court might, for example, decline to recognize a U.S. court judgment on the ground that the Declaration deprived the U.S. courts of jurisdiction over Iranian claims.

[13]International executive agreements have been considered "treaties" for purposes of 28 U.S.C. § 1502. *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 903 (Ct. Cl. 1976).

mination must be made now, not at some future time. This Court has consistently ruled that when a taking is imminent, the availability *vel non* of a Tucker Act remedy must be ascertained. *See, e.g., Regional Rail Reorganization Act Cases*, 419 U.S. at 124-25 (holding that availability of Tucker Act remedy must be ascertained in order to assure adequate compensation for any taking); *Cities Service Co. v. McGrath*, 342 U.S. 330, 335 (1952).

The Courts of Appeals in *Main*, slip op. at 23, and *AIG*, slip op. at 38, held that it was premature to consider whether the President's suspension of claims constitutes a taking. That holding may be correct with respect to the suspension of claims, because the district courts can always consider the taking question when they are called upon later to dismiss the claims. The nullification of an attachment, however, is final because there will be nothing left to attach in the future. The issue must therefore be considered now.

The Court of Appeals in *AIG* attempted to distinguish the *Rail Reorganization Act Cases* on the ground that future losses under the Rail Reorganization Act were certain, while future losses for plaintiffs in *AIG* were speculative. *AIG, slip op.* at 38-40. We disagree with the Court's analysis, but in any event, this Court's decision in *Cities Service*, is directly in point. Cities Service issued negotiable bearer debenture bonds, some of which had been negotiated to enemy holders abroad. Because the Alien Property Custodian could not reach the debentures, he vested the obligation and ordered Cities Service to pay over the value of the bonds. Cities Service argued that the vesting order was an unlawful taking because it might be liable in the future to a holder in due course who obtained a foreign court judgment and levied on overseas assets of Cities Service. The Court noted that it was "improbable,"

that Cities Service would be exposed to double liability, but it held that Cities Service could recoup any double payment from the United States.

> [O]nly with this assurance against double liability can it fairly be said that the present seizure is not itself an unconstitutional taking of petitioner's property. 342 U.S. at 336.

Under the authority of *Cities Service,* excluded claimants must be assured now of access to the Court of Claims. Failing that, the nullification of their attachments is an uncompensated taking.

Respectfully submitted,

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Dated: June 19, 1981

80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FILED
JUN 19 1981

DAMES & MOORE, a partnership,

Petitioner,

v.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents,

and

THE ISLAMIC REPUBLIC OF IRAN, THE ATOMIC ENERGY ORGANIZATION OF THE ISLAMIC REPUBLIC OF IRAN, and BANK MARKAZI IRAN,

Intervenor-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF CERTAIN BANKS AS *AMICI CURIAE* IN SUPPORT OF JUDGMENT

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TABLE OF CONTENTS

PAGE

Table of Authorities i

Motion for Leave to File as *Amici Curiae* v

Brief of Certain Banks as *Amici Curiae* in Support of Judgment 1

Statement of the Situation 3

Interest of *Amici Curiae* 5

Preliminary Statement 5

Summary of Argument 6

POINT I—The Executive Order Nullifying Post-November 14, 1979 Attachments Is Valid Under the International Emergency Economic Powers Act 6

POINT II—The Executive Order Suspending Claims Against Iran Is Valid 9

Conclusion 14

TABLE OF AUTHORITIES

Cases

American Int'l Group, Inc. v. *Islamic Republic of Iran*, Nos. 80-1779 *et al.* (D.C. Cir., decided May 22, 1981, opinion issued June 5, 1981) 2, 7, 10

Chas. T. Main Int'l, Inc. v. *Khuzestan Water & Power Authority*, Nos. 80-1027 *et al.* (1st Cir., May 22, 1981) 2, 7

PAGE

Colorado River Water Conservation Dist. v. *United States*, 424 U.S. 800 (1976) 13

Dames & Moore v. *Atomic Energy Organization of Iran*, No. CV 79-04918 LEW (C.D. Cal.) 1

Dames & Moore v. *Regan*, No. CV 81-2064 LEW (C. D. Cal., June 2, 1981) ..... iii, 2

Electronic Data Systems Corporation Iran v. *The Social Security Organization of the Government of Iran, cert. denied*, No. 80-2035 (U.S., June 8, 1981) vii

First National City Bank v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972) 13

Guessefeldt v. *McGrath*, 342 U.S. 308, 319 (1952) 8

Marschalk Co. v. *Iran Nat'l Airlines Corp.*, 79 Civ. 7035 (CBM) (S.D.N.Y., June 11, 1981) ...7, 11, 12

Orvis v. *Brownell*, 345 U.S. 183 (1953) 8

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 10

United States v. *Apfelbaum*, 445 U.S. 115 (1980) 8

Zemel v. *Rusk*, 381 U.S. 1 (1965) 10

Zittman v. *McGrath*, 341 U.S. 446 (1951) 8

Other Authorities

Declaration of the Government of the Democratic and Popular Republic of Algeria, initialed January 19, 1981 3

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the

PAGE

United States of America and the Government of the Islamic Republic of Iran, initialed January 19, 1981 ..... 3, 13

Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* 10, 11, 12

International Emergency Economic Powers Act, 50 U.S.C. § 1702 .....6, 7, 8, 10

Exec. Order No. 12,170 (November 15, 1979) .. 3, 7

Exec. Order No. 12,279 (January 19, 1981) ... 4, 6, 7

Exec. Order No. 12,294 (February 24, 1981) ... 4, 7, 9

31 C.F.R. § 535.201 (1980) 3
31 C.F.R. § 535.203(e) (1980) 3
31 C.F.R. § 535.310 (1980) 3
31 C.F.R. § 535.418 (1980) 3
31 C.F.R. § 535.502 (1980) 3
31 C.F.R. § 535.504(a) (1980) 3
31 C.F.R. § 535.504(b)(1) (1980) 3
31 C.F.R. § 535.805 (1980) 3

Immunities of Foreign States, Hearings on H.R. 3493, 93d CONG. 1st SESS. (1973) 11

IN THE

Supreme Court of the United States

No. 80-2078

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

v.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents,

and

THE ISLAMIC REPUBLIC OF IRAN, THE ATOMIC ENERGY ORGANIZATION OF THE ISLAMIC REPUBLIC OF IRAN, and BANK MARKAZI IRAN,

Intervenor-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Morgan Guaranty Trust Company of New York, Bank of America National Trust and Savings Association, Chemical Bank, The First National Bank of Chicago, Union Bank, California, Republic National Bank of New York, The Chase Manhattan Bank, N.A., Philadelphia Na-

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tional Bank, Mellon Bank, N.A., Mellon International Finance Corporation, Citibank, N.A., Manufacturers Hanover Trust Company, Wells Fargo Bank, N.A., European-American Banking Corporation, European-American Bank and Trust Company, Marine Midland Bank, N.A., The Bank of New York, Irving Trust Company, and American Express International Banking Corporation (the "Banks") respectfully move this Court for leave to file the accompanying brief in this case as *amici curiae* supporting the President's power

1. to nullify post-November 14, 1979 attachments under the International Emergency Economic Powers Act and

2. to suspend litigation in the United States against Iran.

The Banks have an interest in this case in that they are holding in excess of $1.5 billion for the account of Iran and various Iranian entities. The Banks also have an interest in that they have substantial unsatisfied claims against Iran and various Iranian entities.

The United States has ordered the Banks to transfer these Iranian assets to the Federal Reserve Bank of New York in order to implement by July 19, 1981 the executive agreement with Iran which resolved the hostage crisis. However, the Banks, as well as many other garnishees, have been served with judicial orders of attachment which direct them to continue to hold the Iranian assets. The Banks and other garnishees thus risk possible liability to attaching creditors if they transfer the Iranian assets as ordered by the United States, or sanctions imposed by the United States if they fail to transfer the assets. Neither the Petitioner in this case nor any other party before this Court is faced with the dilemma confronting the Banks and other garnishees.

A number of the Banks have appeared before the Court on two previous occasions in the Iranian assets litigation. In *Electronic Data Systems Corporation Iran* v. *The Social Security Organization of the Government of Iran, cert. denied,* No. 80-2035 (U.S. June 8, 1981), a number of Banks argued that the Court should not grant *certiorari* before judgment because that case did not present the critical issue of whether existing orders of attachment would prevent the Banks and other garnishees from transferring Iranian assets as ordered by the Executive. Certain Banks then appeared as *amici curiae* to urge that the Court grant *certiorari* in the present case because it does present the critical issue. *Dames & Moore* v. *Regan, cert. granted,* No. 80-2078 (U.S. June 11, 1981). Having urged the Court to hear this case, the Banks believe it is now incumbent upon them to inform the Court how, in their view, the issue of Executive authority should be decided.

Accordingly, it is respectfully requested that the Banks be given leave to file the following brief as *amici curiae.*

Date: New York, New York
June 19, 1981

Respectfully submitted,

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IN THE

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No. 80-2078

October Term, 1980

DAMES & MOORE, a partnership,

Petitioner,

v.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents,

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THE ISLAMIC REPUBLIC OF IRAN, THE ATOMIC ENERGY ORGANIZATION OF THE ISLAMIC REPUBLIC OF IRAN, and BANK MARKAZI IRAN,

Intervenor-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

BRIEF OF CERTAIN BANKS AS *AMICI CURIAE* IN SUPPORT OF JUDGMENT

On April 28, 1981 petitioner filed an action seeking injunctive relief against the respondents' interfering with proceedings, including writs of attachment issued by the District Court, in petitioner's prior action entitled *Dames & Moore* v. *Atomic Energy Organization of Iran*, No. CV 79-04918 LEW (C.D. Cal.). The April 28 complaint also

included a request for a declaratory judgment that the international agreements resolving various disputes between the United States and Iran, and the Executive Orders and regulations purporting to implement those agreements, were void insofar as they purported to authorize any such interference with the prior action. The District Court denied petitioner's motion for a preliminary injunction and granted respondents' motion to dismiss for failure to state a claim upon which relief may be granted. *Dames & Moore* v. *Regan,* No. CV 81-2064 LEW (C.D. Cal., June 2, 1981). Petitioner appealed from these rulings to the Court of Appeals and sought a writ of certiorari before judgment, which this Court granted on June 11, 1981.

Statement of the Situation

The legal questions presented herein arise out of a series of Executive Orders issued by Presidents Carter and Reagan, first as national responses to actions taken by the Islamic Republic of Iran on and after November 14, 1979, and then as procedural steps for the international settlement of disputes arising from those actions. The purpose, content, timing, and effect of the various governmental actions have been carefully set forth in opinions of two Courts of Appeal, *American International Group, Inc.* v. *Islamic Republic of Iran,* Nos. 80-1779 *et al.* (D.C. Cir., decided May 22, 1981, opinion issued June 5, 1981) (Typewritten op. at 1-9); *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority,* Nos. 80-1027 *et al.* (1st Cir., May 22, 1981) (Typewritten op. at 2-7), and have been summarized by the Solicitor General in papers filed in the present case. The substance of those actions will be discussed herein, but not the details.

By Executive Order and Treasury regulations issued on and after November 14, 1979, all designated Iranian

property in the United States was frozen. Litigants with claims against Iran could commence actions against Iranian governmental entities, and obtain pre-judgment attachments against Iranian governmental property, only through revocable licenses issued by the Secretary of the Treasury.* Actions were commenced and attachments were obtained by many claimants on the basis of a general license issued by regulation, 31 C.F.R. §§ 535.504(a), 535.418 (1980). *See id.*, § 535.805 (1980) (revocability of license). The regulation, however, expressly precluded the entry or execution of any judgment. 31 C.F.R. § 535.504(b)(1) (1980).

More than a year after issuance of the freeze order and the regulations permitting pre-judgment attachment, prolonged and intense international diplomatic efforts led to the execution of a series of complex agreements among the Governments of Algeria, the United States, and Iran on January 19, 1981.** These agreements resolved, or provided procedures for resolving, a wide range of international disputes involving Iran and the United States. The disputes concerned among other things the trade embargo imposed by the United States; Iran's claim that the United States had been interfering in Iranian internal affairs; the disposition of the former Shah's property; the return of the hostages by Iran; and the return of Iranian property by the United States.

An essential element of the agreements—one that gave rise to the longest and most detailed provisions thereof—related to claims made by United States nationals against

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* *See* Executive Order 12,170, 44 Fed. Reg. 65,729 (1979); 31 C.F.R. 535.201, 535.203(e), 535.310, 535.502 (1980).

** *See, e.g.*, Declaration of the Government of the Democratic and Popular Republic of Algeria, initialed January 19, 1981; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, initialed January 19, 1981.

Iranian governmental entities and to attachments issued against Iranian governmental property. The agreements provided that all domestically-held assets blocked by the Executive Order of November 14, 1979, as implemented, would be released within six months, that is, by July 19, 1981; that an international claims commission, the Iran-United States Claims Tribunal, would be established in The Hague and empowered to adjudicate, pursuant to designated United Nations arbitration procedures, claims asserted by United States nationals against Iranian governmental entities; that more than $3 billion, which had been held by United States banks outside the United States, would immediately be paid to satisfy the claims of various United States and foreign banks under syndicated loan agreements; that an escrow fund of $1.4 billion would be established out of the offshore deposits to satisfy certain additional claims of United States banks that had dealt with Iran; and that another escrow fund, initially in the amount of $1 billion but to be continually replenished by Iran at the $500 million level, would be established out of the domestically-held assets to satisfy other awards made by the Tribunal.

To implement the international agreements, Executive Orders were issued that among other things (1) revoked all licenses for pre-judgment attachments granted after November 14, 1979, and nullified the attachments, (2) directed bank garnishees to remit domestically-held assets to the Federal Reserve Bank of New York for transfer (pursuant to the agreements) to the $1 billion escrow fund or to Iran by July 19, 1981, and (3) suspended claims against Iranian governmental entities pending the submission thereof to the Claims Tribunal.*

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* *See* Executive Order 12,279 (January 19, 1981), 46 Fed. Reg. 7,919 (1981); Executive Order 12,294 (February 24, 1981), 46 Fed. Reg. 14,111 (1981).

Interest of *Amici Curiae*

The issues presented by this action, and by numerous other actions across the United States, involve the validity of the Executive Orders insofar as they nullified the orders of attachment and suspended the claims against Iran. The undersigned banks have an interest in these issues in that they are holding more than $1.5 billion for the account of Iran and various Iranian entities. The Executive Branch has ordered the banks to transfer these assets to the Federal Reserve Bank of New York in order to implement the international agreements, but court orders of attachment preclude any such transfer. The banks also have an interest insofar as they have substantial unsatisfied claims against Iran and various Iranian entities.

Preliminary Statement

The issues presented to this Court are of undeniable national concern at two levels:

1. The foreign policy and international economic interests of the United States counsel that a decision should be rendered upholding the Presidential actions. The failure of the United States to comply with the explicit asset transfer provisions of the January 19, 1981 United States-Algerian-Iranian agreements could be viewed by Iran (and by the international community) as a material breach of the international obligations of the United States, and Iran might therefore feel justified in renouncing or seeking relief from the agreements. Such actions on the part of the United States or Iran could have enormous and unpredictable international consequences for the United States' future relations with Iran and with others who rely upon Executive agreements.

2. Difficult, complex and significant constitutional issues are involved in this extraordinary situation, as reflected by the recent opinions of the Courts of Appeal for the District of Columbia and First Circuits. In these circumstances, judicial and constitutional considerations counsel against the acceptance of any assertions of Executive authority that are broader than needed to support the Presidential actions in the present case.

We respectfully submit that this Court can and should accomodate all of these national interests by expeditiously affirming the judgment below, and by confirming the validity of the Presidential actions, on grounds that will cover all of the so-called Iranian cases, but will be narrow enough not to give rise to sweeping interpretations in future cases.

Summary of Argument

1. The Executive Order nullifying post-November 14, 1979 attachments is a valid exercise of Presidential power under the International Emergency Economic Powers Act;

2. The Executive Order suspending claims against Iran is a valid exercise of Executive power in which Congress has acquiesced.

ARGUMENT

POINT I

The Executive Order Nullifying Post-November 14, 1979 Attachments Is Valid Under the International Emergency Economic Powers Act.

Executive Order 12,279, which nullified post-November 14, 1979 attachments of Iranian governmental assets, was based by President Carter upon five sources of express or

inherent power.* This Court need not address each of the claimed elements of Presidential power, since Section 203 of the International Emergency Economic Powers Act, 50 U.S.C. § 1702 ("IEEPA"), provides ample authority for the Executive Order.

Congress through IEEPA has specifically authorized the President to take action with the purpose and effect of Executive Order 12,279. Enacted by Congress in 1977 to protect the exclusive Federal power to conduct foreign policy, IEEPA authorizes the President, in periods of declared national emergency,** to prohibit the acquisition of, and to "nullify" or "void" the exercise of any right to, property in which a foreign country or national thereof has any interest. It also authorizes the President to "direct and compel . . . [the] transfer, withdrawal . . . or exportation" of such property. Executive Order 12,279 did no more—and no less—than (a) "nullify" the attachments previously granted by revocable licenses (which were in turn revoked) and (b) direct that the assets in question be transferred no later than July 19, 1981, all in accordance with the foreign policy of the United States in a declared national emergency.

The Courts of Appeal for the District of Columbia Circuit and the First Circuit have held that Executive Order 12,279 was authorized and valid under the provisions of IEEPA. *American International Group, Inc.* v. *Islamic Republic of Iran, supra* at 19-23; *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority, supra* at 8-13. No appellate court has held or suggested the contrary. *But see Marschalk Co.* v. *Iran Nat'l Airlines Corp.*, 79 Civ. 7035 (CBM) (S.D.N.Y., June 11, 1981).

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* The same bases were asserted by President Reagan in Executive Order 12,294 which, *inter alia,* ratified Executive Order 12,279.

** Such a declaration was issued with respect to the Iranian crisis. *See* Executive Order 12,170, 44 Fed. Reg. 65,729 (1979).

Petitioner, like other litigants, does not contend that the concededly "broad" language of IEEPA is on its face insufficient to authorize the voiding of the post-November 14, 1979 attachments. Rather, petitioner advances an anomolous argument based on the predecessor of IEEPA: since the language of IEEPA was derived from the Trading with the Enemy Act, a "makeshift patchwork" (*Guessefeldt* v. *McGrath*, 342 U.S. 308, 319 (1952)) which Congress intended in some respects to narrow by enacting IEEPA, this Court should ignore the plain language of IEEPA and construe that statute in light of the supposed purposes of and policy considerations underlying the Trading with the Enemy Act.*

The pronouncements of this Court do not justify such a methodology for construing the plain language of an act considered and enacted by Congress in 1977. Rather, they reaffirm the proposition that "absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language." *United States* v. *Apfelbaum*, 445 U.S. 115, 121 (1980). On the basis of the plain language of IEEPA, this Court should affirm the validity of Executive Order 12,279 insofar as it voided the post-November 14, 1979 attachments and ordered the transfer of Iranian property.

Finally, we note petitioner's argument that the President should not be permitted to "transfer" the Iranian assets since IEEPA provided that express congressional authorization was necessary before the President exercised the purportedly analogous power to vest assets in an alien property cus-

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* To the extent that the purpose and effect of the Trading with the Enemy Act may be pertinent to ascertaining the intended scope of IEEPA, the undersigned banks endorse the views of the District of Columbia and First Circuits concerning *Zittman* v. *McGrath*, 341 U.S. 446 (1951) and *Orvis* v. *Brownell*, 345 U.S. 183 (1953).

todian. Petitioner's argument fails because the "transfer" in the present case does not involve the United States Government's taking the property away from its owners; the transfer order herein does no more than facilitate the return of the property to Iran as soon as the attachments have been vacated.

POINT II

The Executive Order Suspending Claims Against Iran Is Valid.

Executive Order 12,294 was an essential step in the implementation of the international agreements described above. Those agreements established a Claims Tribunal to resolve all covered claims. The individual members of the Claims Tribunal have been selected in accordance with normal and accepted arbitration practice; the procedures will be established United Nations arbitration rules; the forum will be neutral and accessible; and large and renewable escrow funds will be available for the expeditious payment of adjudicated claims. Against this background, Executive Order 12,294 directed that all claims encompassed by the agreements be suspended pending referral thereof to the Claims Tribunal.

The undersigned banks submit that in the context of international agreements seeking to resolve a wide-ranging series of government-to-government disputes, this Court should affirm the power of the President to suspend proceedings in the United States while providing for an alternative forum to resolve United States nationals' claims against foreign government-controlled entities.

The authority of the President to take such action by executive agreement may be checked by Congress. However, Congress has, through long-standing practice, chosen to do

so only when and to the extent it deems its intervention to be necessary and appropriate. *See American International Group, Inc.*, v. *Islamic Republic of Iran, supra* at 30, 34. In the present context, the President has periodically reported to Congress as required by IEEPA, and the Senate Foreign Relations and Banking Committees have held hearings with respect to the Executive Orders. Congress—after thus actively following the Iranian crisis from its outset—has not in any way expressed disagreement with the Presidential actions or taken steps to modify any part of the underlying international agreements.

This case does not therefore involve an assertion of Executive authority unadorned by any semblance of Congressional authorization or acquiescence. *Compare Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952). Rather, it involves an assertion of limited Executive authority, as an occasional but necessary adjunct to the conceded power to conduct foreign policy by normalizing relations or recognizing governments. This exercise of authority has been supported for decades by the real, though tacit, assent of the Legislative Branch. *Cf Zemel* v. *Rusk,* 381 U.S. 1, 11-12 (1965) ("Under some circumstances, Congress' failure to repeal or revise in the face of such administrative interpretation has been held to constitute persuasive evidence that that interpretation is the one intended by Congress"). The historical recognition and acceptance of Presidential authority to settle claims by executive agreement without the formal, prior approval of Congress is a far more compelling demonstration of constitutional significance than any invocation of labels or rigid attempt to categorize artificially the dynamics of governmental action.

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, should not be read as an implied withdrawal of this

legislative assent. The Act, proposed by the Executive Branch, withdrew from the Executive Branch its traditional role of making suggestions of immunity in suits against foreign governments. The Act and its legislative history did not deal with situations where the Executive—far from granting immunity to the foreign government—negotiated new protections for the claimants (including in the present case the placing of substantial funds in escrow, the waiver of sovereign immunity by Iran and the agreement by Iran to worldwide enforceability of awards). The Act and its legislative history also did not purport to limit the Presidential authority to resolve international disputes by means of government-to-government agreements that include a claims settlement procedure for claims by United States nationals against foreign governments.

Petitioner concedes in its petition for a writ of certiorari (page 18) that "there is little indication that Congress considered emergencies such as the Iranian hostage crisis when it enacted the FSIA," and the limited legislative history cited by Judge Duffy at pages 28-29 of the typewritten *Marschalk* opinion is not inconsistent with this concession. Judge Duffy, in pointing to Congress' deletion of language that would have made the Foreign Sovereign Immunities Act subject to "future international agreements," overlooked the fact that the agreements under consideration were exemplified by "friendship, commerce, and navigation treaties . . . which touch the question of sovereignty" rather than by the kind of agreements under consideration here. Judge Duffy also overlooked the Legal Adviser's testimony indicating that under the Act, the State Department would no longer be in the business of making suggestions of sovereign immunity to the courts, but "its ability to make suggestions with respect to other questions would remain unimpaired." *See* Immunities of Foreign States, HEARINGS on H.R. 3493

Before the Subcommittee on Claims and Governmental Relations of the Committee on the Judiciary, 93rd CONG., 1st Sess., pp. 18, 15 (1973).

If, as the District Court held in *Marschalk, supra* at 53 *et seq.*, Congress had viewed the Act as limiting the Executive's authority to establish a claims settlement procedure in a situation like that presented here, or had viewed the Executive Orders as trenching on its prerogatives, it had ample opportunity to express those views in the hearings held in February of 1981 upon the international agreements settling the Iranian crisis. The Congressional failure to react, coupled with the silence of the Foreign Sovereign Immunities Act upon the questions at issue, strongly counsels against an expansive reading of the Act that would override decades of governmental practice, nullify important aspects of the settlements at issue and place the United States Government in breach of its international agreements. Such consequences should be risked, if at all, only if there has been a clear Congressional assertion of power that is inconsistent with the actions of the Executive. No such clear assertion of power has been made by Congress, and indeed the only indications are that Congress has acquiesced in the Executive's action.

As the Courts of Appeal for the District of Columbia and First Circuits have held, the Foreign Sovereign Immunities Act may be inapplicable for another reason: the Executive Orders did not remove from the federal courts their jurisdiction to hear claims against Iran, but rather settled the claims and thus modified the substantive law to be applied by the courts. An alternative approach would be for this Court as a discretionary matter to direct that in the unique circumstances presented herein, the lower courts should vacate the post-November 14, 1979 attachments but thereafter refrain from exercising their jurisdic-

tion, if any, to proceed with the Iranian cases. Rather, they should permit the cases to go forward in the alternative forum and with the additional protections provided by the Executive agreements.

By thus invoking the discretionary power not to exercise further jurisdiction over the Iranian cases, the Court would make it unnecessary to reach the constitutional issue of whether the Executive can require that those cases be suspended. Such abstention might be particularly appropriate here, since the United States claimants may in fact receive satisfaction through the means provided in the Executive agreements;* and since many such claimants (including the undersigned banks) are reserving all rights they may have or acquire, including for example rights against the United States Government, if they do not receive adequate compensation.** In such circumstances, a direction that the lower courts refrain from exercising further jurisdiction may be considered an appropriate vehicle for permitting the agreements to be implemented without ruling on a difficult constitutional issue that may never arise in the future. *Cf. Colorado River Water Conservation Dist.* v. *United States,* 424 U.S. 800, 813-14 (1976); *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 767-68 (1972) (Opinion of Rehnquist, *J.*).

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* We note in this connection that many aspects of the agreements have already been effectuated. The hostages have been released. Assets held abroad by United States banks have been transferred. Some of the claims have been repaid. Procedures have been implemented to establish the Claims Tribunal. The members of the Tribunal have been selected in accordance with accepted arbitration practice. Substantial funds have been placed in escrow.

** Claimants who are barred from the Tribunal under Article II, paragraph 1 of the Claims Settlement declaration may pursue judicial remedies to the same extent otherwise permitted by their contracts.

CONCLUSION

This Court should affirm the validity of the Executive Orders and regulations at issue insofar as they vacate the post-November 14, 1979 attachments and suspend the claims of United States nationals pending the submission of the claims to the Iran-United States Claims Tribunal.

Dated: New York, New York
June 19, 1981

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CORRECTED COPY

No. 80-2078.

IN THE

Supreme Court of the United States

October Term, 1981

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA and THE UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF DANIEL, MANN, JOHNSON & MENDENHALL, a California corporation, together with BRIEF AMICUS CURIAE.

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TABLE OF CONTENTS

	Page
Motion for Leave to File Brief Amicus Curiae on Behalf of Daniel, Mann, Johnson & Mendenhall, a California Corporation	1
Brief Amicus Curiae on Behalf of Daniel, Mann, Johnson & Mendenhall, a California Corporation	1
Questions Presented	1
Interest of the Amicus Curiae	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases	Page
Armstrong v. United States, 364 U.S. 40, 80 S.Ct. 1563	3, 7
Battaglia v. General Motors Corporation, 169 F.2d 254 (2d Cir.), cert. den. 335 U.S. 887 (1948)	5
Electronic Data Systems, etc. v. The Social Security Organization . . . Iran, 508 F.Supp. 1350	3
Glidden Co. v. Zdanok, 370 U.S. 530 (1962)	5
Palmore v. United States, 411 U.S. 389 (1973)	5
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	6, 7
Constitution	
United States Constitution, Art. II	5, 6
United States Constitution, Art. III	1, 2, 5, 6, 7
United States Constitution, Fifth Amendment	2, 5, 7
Rule	
Rules of the Supreme Court of the United States, Rule 36	1, 3
Statutes	
Trading With The Enemy Act, Sec. 5(b)	6
United States Code, Title 50, Secs. 1701 et seq.	5

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF DANIEL, MANN, JOHNSON & MENDENHALL, a California corporation.

Daniel, Mann, Johnson & Mendenhall, a California corporation (''DMJM''), hereby respectfully moves for leave to file a brief *amicus curiae* in this case in support of Petitioner as provided in Rule 36 of the Rules of this Court. This applicant believes that consent would be given by all parties hereto, but the time schedule set in this case will not permit the procedure for such consent to be obtained for a timely filing of this brief, leaving only this motion as the means for presentation thereof.

DMJM has an interest in this case in that it is a plaintiff in an action which was consolidated with Petitioner's in the United States District Court, Central District of California,

DANIEL, MANN, JOHNSON & MENDENHALL v. DONALD T. REGAN, et al., CV-81-1101-LEW, which case was dismissed upon motion by the Government, as was the instant case of Petitioner's. Both cases are presently before the Ninth Circuit Court of Appeals. Underlying the DMJM case is *DANIEL, MANN, JOHNSON & MENDENHALL v. IMPERIAL GOVERNMENT OF IRAN, et al.*, CV-80-0277-LEW, which, along with Petitioner's underlying action, was suspended by the Court, with the attachment and garnishment of DMJM's and Petitioner's judgment having been vacated. The Government was enjoined by the Court from proceeding with any transfer or interference with the attached assets during the pendency of DMJM's and Petitioner's appeals.

There are distinctions between the Dames & Moore ("D&M") and DMJM cases, despite general similarities. It is within these distinguishing areas that certain artificial limitations could occur in a possible holding by this Court.

There are differences regarding the forum selection provisions in the subject contracts. There is the additional fact that Petitioner holds a judgment in its underlying case whereas DMJM has an attachment and garnishment. Aside from these and other substantive distinctions, there is some diversity in the approaches to legal analysis by DMJM and Petitioner. For example, Petitioner questions, as a primary gambit, the President's authority to "settle legally enforceable claims of American citizens against foreign states . . ." DMJM would ask this question another way: "Does the President have the authority, or even more succinctly stated, the constitutional leave, to intrude upon the jurisdiction of Article III Courts once lawfully obtained?" The other questions asked might be so interdependent upon the first one as to be inseparable. If the President has certain rights under some conditions to invade the Courts' precincts,

the next question would need to be addressed. Does the President have the authority to void or nullify lawful orders of the Courts? If such authority could be found and assuming it passes constitutional muster, the final question should be asked: "does the President have the right and constitutional sanction to deprive litigants before the Court of their vested property rights?" The latter issue presumes that assets under garnishment constitute "property rights." *Armstrong v. United States*, 364 U.S. 40, 80 S.Ct. 1563.

DMJM is informed that Petitioner is only one of two plaintiffs among the several hundred in relevant cases which hold judgments in underlying cases. DMJM has further information that the other litigant had obtained an attachment prior to the assets "freeze" under the Iranian Assets Control Regulations, November 14, 1979. See *Electronic Data Systems, etc. v. The Social Security Organization . . . Iran*, 508 F.Supp. 1350, 1360.

On the other hand, DMJM is more representative of the remainder of the several hundred U.S. litigants, who do not hold judgments and whose attachments and garnishments postdate the "freeze." DMJM respectfully suggests that a ruling by this Court which encompasses the maximum number of issues extending over the greatest number of these cases possible would best accomplish the purpose sought by all parties in urging this Court to grant certiorari to Petitioner.

In addition to DMJM's patent qualification for the filing of its brief as *amicus* under Rule 36, there is the more compelling public interest factor to be served. If some perspective may be added hereby to help bring the confused borders of the Separation of Powers doctrine into sharper focus, so that future mischief by successor Presidents may be avoided, that may be sufficient unto itself.

For these reasons, DMJM asks that its attached *amicus curiae* brief be ordered filed.

DATED: June 16, 1981.

Respectfully submitted,

GERALD M. SINGER,

Attorney for Applicant, Daniel, Mann, Johnson & Mendenhall.

No. ....

IN THE

Supreme Court of the United States

October Term, 1981

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Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA and THE UNITED STATES OF AMERICA,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF DANIEL, MANN, JOHNSON & MENDENHALL, a California Corporation.

Questions Presented.

This case presents questions which are vital to the life of the United States Constitution. The following questions should be presented in augmentation to those now before the Court as stated in Petitioner's Brief:

1. Whether the Constitution grants to the Congress the right to permit the President to intrude upon the jurisdiction of Article III Courts, once lawfully obtained.

2. Whether the Congress does in fact purport to authorize the President to intrude upon the jurisdiction of

Article III Courts once that jurisdiction has been lawfully obtained.

3. Whether the President has the inherent power under the Constitution to invade the jurisdiction of Article III Courts once lawfully obtained.

4. Whether assets subject to attachments and garnishments under Article III Court orders, are property rights vested in litigants which are protected by the Fifth Amendment of the Constitution and beyond the reach of the President acting within his power to negotiate and settle foreign claims or to effectuate the release of U.S. citizens held by foreign powers.

Interest of the Amicus Curiae.

Applicant, DANIEL, MANN, JOHNSON & MENDENHALL ("DMJM"), is in a situation comparable to Petitioner, DAMES & MOORE. Indeed, such differences as do exist between DMJM's and "D&M's" cases would emphasize the pervasiveness of the issues assigned in D&M's brief and the grave constitutional questions raised in these and the other hundreds of matters now pending before courts across the nation, containing similar issues.

DMJM's action, *Daniel, Mann, Johnson & Mendenhall v. Donald T. Regan, et al.*, CV-81-1101-Lew was filed in the United States District Court, Central District of California on March 5, 1981, along with a briefed motion for preliminary injunction to enjoin defendants from proceeding with their announced vacating of DMJM's attachment and garnishment and the suspension of its underlying case, *Daniel, Mann, Johnson & Mendenhall v. Imperial Government of Iran, et al.*, CV-80-0277-LEW.

Thereafter, Petitioner, D&M filed an *amicus curiae* brief in DMJM's case in support of DMJM's motion for injunction, on April 28, 1981. Subsequently, D&M filed an action

against Donald T. Regan and the United States, alleging essentially the same facts as in DMJM's case and the two cases were consolidated on D&M's request. On June 2, 1981, the Court denied the relief sought in both cases and granted a motion by defendants to suspend the underlying cases of both plaintiffs and vacate the attachments in both and the judgment in D&M's case. DMJM filed immediate appeals of judgments in its cases.

A motion by DMJM upon an order shortening time to enjoin defendants from transferring or otherwise interfering with the assets subject to its attachment during the pendency of its appeal, was granted by the Court on June 11, 1981.

The differences appearing in DMJM's and D&M's cases offer the possibility, inadvertent or otherwise, that a decision by this Court may somehow fall short of full applicability to DMJM's case. D&M holds a judgment in its underlying case whereas DMJM has an attachment and garnishment. Language to the effect of prohibiting interference with or nullification of a "judgment" could be construed as not applicable to an attachment or garnishment. This is not perceived as tracking any particular distinctions in statutes or court rules, since presumably all court orders enjoy equal jurisdictional status. But, confusion could occur and distinctions may exist in the minds of judges and in subsequent rulings.

There also appear to be some arguable differences in the phrasing of the "forum selection" provisions in the contracts which are subject to DMJM's and D&M's underlying cases. Since the "right" of arbitration under the proposed neutral arbitration tribunal will be preliminarily dictated by that language, such differences could be crucial.

DMJM respectfully suggests that its case is even more representative of the other hundreds of cases now pending

in various courts against Iranian defendants than D&M's. Only two of these cases involve judgments, the others involve no more than attachments and garnishments.

DMJM is not suggesting that the interpretation of the "forum selection" language in these two cases would be more or less favorable for either in respect of arbitration since DMJM, at least, does not consider that advent as one devoutly to be wished.

ARGUMENT.

1. The Congress can confer and redefine the jurisdiction of United States Courts. *Palmore v. United States*, 411 U.S. 389, 401 (1973); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). This is not disputed. But, Congress cannot authorize interference with the jurisdiction of Article III Courts once that jurisdiction has been derived from lawful criteria. In fact, Congress cannot even withhold or restrict jurisdiction *prior* to its grant if that jurisdiction is necessary to the maintenance of life, liberty or property rights. If it is necessary to the national interest to deprive property rights, then such deprivation must be compensated as per the Fifth Amendment. *Battaglia v. General Motors Corporation*, 169 F.2d 254, 257 (2d Cir.), *cert. den.* 335 U.S. 887 (1948).

The power to adjudicate the issues raised in these cases derives from Article III of the Constitution and from the Foreign Sovereign Immunities Act (''FSIA''). Hence, since jurisdiction was lawfully obtained by the District Court in these matters, Defendants were without right and in violation of Articles II and III of the U.S. Constitution in interference therewith. Moreover, even had Congress purported to grant to Defendants the ''right'' to intrude upon that Court, such a grant would have been repugnant to the Constitution.

2. Defendants have taken the position that the President did in fact have power to innovate Executive Order No. 12279 which articulates the authority under which the rulings against DMJM and D&M were grounded. The primary source of such authority is indexed as the International Emergency Economic Powers Act (''IEEPA''), 50 U.S.C. §§1701 *et seq.*

Defendants fail to point out any specific language therein which would authorize the President to tamper with the

exercised jurisdiction of an Article III Court or to deprive any litigant thereunder of any vested property right. Indeed, no such language exists in that or any other statute. In fact, the grant of authorities under IEEPA expressly excluded certain authorities granted to the President under the previous Act, §5(b), Trading With The Enemy Act. The powers under that Act included the power to "vest, *i.e.*, to take title to foreign property." That power was specifically excluded from the subsequent Act in an obvious move to limit presidential powers. Although IEEPA still gives the President the power to "freeze" foreign assets, he notably does not have the power to "seize" such assets. But, beyond this, there is certainly no language in that Act which would authorize the intrusion into the Court's jurisdiction to do anything whatever with any property. Nor indeed does the Constitution permit such language. Such authority was likewise absent from the prior Trading With The Enemy Act.

3. Defendants suggest the outrageous contention that the President has the "plenary" power to deal with assets which are within the Court's custody under lawful attachment orders, in the manner outlined under Executive Order 12279, in his "inherent presidential powers." Significantly absent from such claims, as in all of Defendants' arguments, is any reference to specific sources of such "inherent power." Certainly, no such "power" stems from either Article II or Article III of the U.S. Constitution.

The case repeatedly relied upon by Defendants for their urging that the President's power is at its highest when supported by the expressed will of Congress, is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). But, that case is demonstrably misplaced. First, that case involved the question of the Executive Branch moving into the provinces of the Legislative Branch, not the Judicial Branch. There is no dispute that the President can act in

matters reserved to the Congress with permission given by the Congress. Similarly, the President may issue orders which normally may only be considered by the Courts, with approval expressly given by the Courts. But Congress cannot sanctify intrusions into the Judicial Branch by the President. Even if the interpretation of *Youngstown* by Defendants were correct, which it is not, there would be no applicability to this case.

Second, *Youngstown* did not hold that the President was empowered to vest foreign assets in the custody and control of the Executive Branch. Further, there is no logical application of any of the *Youngstown* facts to the divesting of property interests held by either D&M or DMJM which interests were subject to adjudication by the Court.

There can be little doubt but that both D&M and DMJM have property interests in their respective lien orders issued by the District Court, and which interests are cognizable under the Fifth Amendment. *Armstrong v. United States*, 364 U.S. 40 (1960).

In summary, there is no authority given to the President, either present under the President's "inherent powers" or granted by the Congress which empowers the President to (a) countermand or invalidate lawful orders of Article III Courts issued pursuant to any lawful jurisdictional ground, (b) to interfere with the valid exercise of Congressionally granted jurisdiction by Article III Courts, (c) vest foreign assets located in the United States in the custody and control of the Executive Branch, or (d) to confiscate the property interests of any citizen without just compensation as required by the Fifth Amendment.

4. Lastly, the several hundred cases which will all be directly affected by this Court's ruling, present only part of the mischief which could result. Lower court rulings thus

far in these cases have offered the very first definitive judgments which broadly state that the President has the right to puncture the seal which insulates the Branches of Government. What far-reaching effects might occur under future administrations cannot be foretold. But, that they will be contrary to the meaning and intent of the doctrine which has separated the Branches for two hundred years, and which has been responsible in no little way for the maintenance of our Constitutional form of Government must be patently obvious.

Conclusion.

The orders filed against D&M and DMJM entered June 2, 1981 should be reversed upon a writ issued as prayed in Petitioner's Brief.

DATED: June 16, 1981.

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NOV 19 1981

No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a Partnership,
Petitioner,

v.

DONALD T. REGAN, *et al.*,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF ELECTRONIC DATA SYSTEMS CORPORATION IRAN IN SUPPORT OF DAMES & MOORE

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IN THE

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OCTOBER TERM, 1980

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DONALD T. REGAN, *et al.*,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Electronic Data Systems Corporation Iran ("EDS") respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae* in support of Petitioner Dames & Moore.* EDS has a unique and substantial interest in presenting its position, which is different from that of any litigant in the Iranian cases, on the sweeping questions of critical national importance pending before this Court. EDS respectfully submits that only through the facts presented in its fully devel-

---

* Both the Petitioner, Dames & Moore, and all Respondents, the Secretary of the Treasury and the United States of America, have consented in writing to the filing of an *amicus* brief by EDS. Intervenor Bank Markazi also has consented. Letters documenting consent by these parties are being lodged with the Court. The two remaining Intervenors have refused consent.

oped litigation may the full scope of the critical constitutional ramifications of the questions presented for determination before this Court be fairly decided.

After two and one-third years of litigation against the Government of Iran in two District Courts and two Courts of Appeals,* the Final Judgment and Order of Attachment secured by EDS have been purportedly "nullified" by an unprecedented Executive fiat that is now before this Court on an extraordinary expedited basis. Unlike the other parties and *amici* in this case, EDS's case is, as conceded by the United States, "unique":

> 1. Only EDS, whose action was commenced prior to the Executive's "freeze" order of November 14, 1979, has an effective and enforceable final judgment against the Government of Iran; secured prior to the Algerian Declarations of January 19, 1981; and after an extensive trial on the merits in which Iran participated fully.
>
> 2. Only EDS secured an Order of Attachment, after a full hearing in which Iran actively participated, prior to the freeze; the attached funds, now, totaling some $20 million, were placed in the custody of the court and promptly deposited in a United States Marshal's account.

Furthermore, only EDS has a final judgment and permanent injunction against the United States from interfering with its Final Judgment and Order of Attachment, secured after contested cross-motions for summary judgment, and, thus, EDS is the sole litigant presenting itself to this Court with a final adjudication of its rights against the Executive.

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* Electronic Data Sys. Iran v. Social Security Organization of Iran, No. CA3-79-218-F (filed February 23, 1979, N.D. Tex.), and Nos. 79-2641, 80-1641 & 81-1147 (5th Cir.), *appeals pending*; Electronic Data Sys. Iran v. Social Security Organization of Iran, 71 Civ. 1711 (CLB) (filed April 2, 1979, S.D.N.Y.), *remanded*, 610 F.2d 94 (2d Cir. 1979).

The *EDS* case singularly illustrates the broad consequences of the unprecedented claims of Executive power asserted in this case on the separation of powers among the three branches of Government, unconstitutionally voiding the jurisdiction of federal courts. In short, neither Petitioner nor any other claimant faces the possibility confronting EDS of forfeiting a valid and enforceable judgment, obtained after a full trial on the merits and secured by attached funds placed in the custody of the Court before the Executive freeze order. It is submitted that no other party before this Court has an adequate stake to advance the views set forth in the accompanying brief.

Accordingly, it is respectfully requested that EDS be granted leave to file the following brief as *amicus curiae.*

Dated: June 19, 1981

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE EXECUTIVE'S POWER CANNOT ENCOMPASS A "SUSPENSION" OF EFFECTIVE AND ENFORCEABLE JUDGMENTS SECURED AFTER A FULL ADJUDICATION	4
II. THE EXECUTIVE DOES NOT HAVE THE POWER TO NULLIFY OR NEGATE A PRE-FREEZE ATTACHMENT OF FUNDS *IN CUSTODIA LEGIS*	11
CONCLUSION	15

TABLE OF CASES AND AUTHORITIES

CASES	Page
American International Group, Inc. v. Islamic Republic of Iran, Nos. 80-1779 & 80-1891 (D.C. Cir. May 22, 1981)	5, 11
Campbell v. United States, 373 U.S. 487 (1963)	8
Chas. T. Main International, Inc. v. United States, No. 81-1176 (1st Cir. May 22, 1981)	5, 10, 15
Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948)	9
Converse v. Highway Construction Co., 107 F.2d 127 (6th Cir. 1939)	14
Electronic Data Systems Corp. Iran v. Social Security Organization of Iran, No. 80-2035, *cert. denied* (June 8, 1981)	2, 12
Electronic Data Systems Corp. Iran v. Social Security Organization of Iran, 610 F.2d 94, 95 (2d Cir. 1979)	12
Electronic Data Systems Corp. Iran v. Social Security Organization Iran, No. CA3-79-218-F (N.D. Tex.)	2, 4, 5, 10, 11, 13
Ex Parte Tyler, 149 U.S. 164 (1893)	3, 14
Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183 (1941)	8
In re Rubin, 242 F. Supp. 408 (E.D. Pa. 1965)	15
Marschalk Co. v. Iran National Airlines Corp., 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981)	4, 5, 6, 11
McCullough v. Virginia, 172 U.S. 102 (1898)	3, 7
National Airmotive Corp. v. Iran, 499 F. Supp. 401 (D.D.C. 1980)	8
Orvis v. Brownell, 345 U.S. 183 (1953)	15
Texas Trading & Milling Corp. v. Federal Republic of Nigeria, No. 80-7703 (2d Cir. April 16, 1981)	11
The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)	6
United States v. Brown, 381 U.S. 437 (1965)	15
United States v. Klein, 80 U.S. (13 Wall.) 128 (1872)	3, 9

TABLE OF CASES AND AUTHORITIES—Continued

	Page
United States v. Nixon, 418 U.S. 683 (1974)	6, 9
United States v. O'Grady, 89 U.S. (22 Wall.) 641, 648 (1875)	7
United States v. Peters, 9 U.S. (5 Cranch) 115 (1809)	6
Vishipco Line v. Chase Manhattan Bank, No. 77-1251 (S.D.N.Y. November 3, 1979)	8
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	15
STATUTES	
28 U.S.C. §§ 1330, 1605(a) (1976)	11
50 U.S.C. § 1702(a)(1) (Supp. III 1979)	5
MISCELLANEOUS	
Algerian Declarations	5
Iranian Assets Control Regulations, 31 C.F.R. §§ 535.213, .218 (1981), *as amended*	13
Exec. Order No. 12279, 46 Fed. Reg. 7919 (1981)	12
Exec. Order No. 12294, 46 Fed. Reg. 14111 (1981)	13
Justice Samuel Miller, On the Constitution (1891)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2078

DAMES & MOORE, a Partnership,
Petitioner,

v.

DONALD T. REGAN, *et al.*,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF ELECTRONIC DATA SYSTEMS CORPORATION IRAN IN SUPPORT OF DAMES & MOORE

INTRODUCTION

Electronic Data Systems Corporation Iran ("EDS")[1] has pending in the lower courts a case comprehended by the issues that have been placed before this Court. The United States seeks on those issues a ruling "that will control in *all* district courts, . . . and remove any remaining uncertainty about the validity" of the Executive's actions (Mem. Resps. at 9). This brief addresses the ramifications of a broad ruling with respect to the

[1] EDS is a subsidiary of E.D.S. World Corporation, a subsidiary in turn of Electronic Data Systems Corporation.

claim of executive power implicit in this request. Those ramifications are illustrated by EDS's situation, which the United States has termed "unique",[2] and which differs from those of Dames & Moore and all other claimants in two respects:

> 1. EDS has an effective and enforceable judgment against Iran—secured prior to the Algerian Declarations of January 19, 1981; the judgment was based on an adjudication of the validity of its commercial claim after an extensive trial in which Iran participated fully.
>
> 2. EDS obtained its attachment of Iranian funds on June 13, 1979—five months before the President's order freezing Iranian assets on November 14, 1979; not only were the funds attached at that time, but they were also reduced to the custody of the court and placed in a marshal's account.

The district court in EDS's case found unconstitutional the assertions of Executive power extending to this judgment and attachment.[3]

SUMMARY OF ARGUMENT

EDS supports the Dames & Moore position and will not argue it here; this brief deals only with the patent unconstitutionality, and particularly dangerous consequences, of (1) permitting the President to extinguish an effective and enforceable judgment based on a full adjudication of the merits, and (2) permitting the President to destroy *pre-freeze* attachments of funds in court custody.

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[2] *See* Memorandum for the Federal Respondents in Opposition, Electronic Data Sys. Corp. Iran v. Social Security Organization of Iran, No. 80-2035, at 8 n.8, *cert. denied*, 49 U.S.L.W. 3912, (June 8, 1981).

[3] Electronic Data Sys. Corp. Iran v. Social Security Organization of Iran, No. CA3-79-218-F (N.D. Tex. June 7, 1981).

I

The Executive, acting alone, proposes to undo the final judgment and findings of an article III court, forcing a successful litigant to plead its case and prove its facts again in a new and alien forum. This assertion of power is unprecedented. If its arguments prevail, the Executive would gain supervisory authority over the rulings of a co-equal branch of the government; it could render advisory—or meaningless—federal judgments under the Foreign Sovereign Immunities Act.

The central function of the judiciary is to find facts and render judgments based on those facts. An effective and enforceable judgment has been rendered in EDS's case. Even while on appeal, it is safe from interference, *McCollough v. Virginia*, 172 U.S. 102 (1898), as is the fact-finding process itself. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

II

The funds attached by EDS were attached and held in the custody of the court well before the freeze began. They are not subject to interference. *Ex Parte Tyler*, 149 U.S. 164 (1893). Other courts ruling on the Executive's authority over Iran claimants' attachments have sought narrow grounds to avoid the destruction of pre-freeze attachments. The Executive should not be granted authority to nullify pre-freeze attachments directly—by transferring them abroad—or indirectly—by forbidding the exercise of the rights conferred by an attachment.

ARGUMENT

I. THE EXECUTIVE'S POWERS CANNOT ENCOMPASS A "SUSPENSION" OF EFFECTIVE AND ENFORCEABLE JUDGMENTS SECURED AFTER A FULL ADJUDICATION OF THE MERITS

EDS brought its breach of contract suit against Iran in February 1979 and obtained its attachment in June 1979—long before the hostage crisis began in November of that year.[4] Iran participated fully in the trial, availing itself of extensive discovery against EDS, deposing numerous EDS witnesses, and securing thousands of EDS documents. Trial, originally scheduled for August 1979, was postponed on several occasions at Iran's request to permit further trial preparation. At the trial itself, which lasted two weeks during January 1980, Iran's counsel presented in full his case, including the testimony of witnesses brought from Iran. Upon consideration of the evidence and post-trial briefs by all parties, the district court entered findings of fact and conclusions of law; based on those adjudications, it entered a final judgment on May 9, 1980. The judgment is effective and enforceable, the district court and court of appeals both having denied requests for stays on appeal.

The President's Executive Order of February 24, 1981 is said to "suspend" [5] this judgment. The plain purpose

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[4] These facts and those set forth below appear in the record in Electronic Data Sys. Corp. Iran v. Social Security Organization of Iran, No. CA3-79-218-F (N.D. Tex.) and Nos. 81-1147, 80-1641 & 79-2641 (5th Cir.), *appeal pending*.

[5] Judge Duffy's opinion pierces the terminology:

> While it may be that "suspending" the claims without limit is more acceptable in a public relations sense than "terminating" or "nullifying" the claims, the result in either case is to prevent claimants from asserting their rights in federal court.

Marschalk Co. v. Iran Nat'l Airlines Corp., 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981).

of the order is to undo the judgment—and the full adjudication of validity of the underlying claim—and force the judgment holder to relitigate his original claim anew. Once he does so, he waives the jurisdiction of the U.S. court in which his judgment lies "suspended." Claims Declaration, Art. VII, para. 2 (Pet. App. 34).

1. By applying the order to the EDS judgment, the Executive demonstrates the breathtaking scope of a power it claims, but does not have. By asserting the power to create, without Congressional authorization,[6] a "new rule of law" for claims against foreign states and foreign nationals, the Executive is claiming authority to remove such cases from article III courts at any stage in the litigation—even after the litigation is over. Algerian Declaration, para. A (Pet. App. 22). The United States has not asked that a new rule of law be applied to the facts found by the district court in ruling on EDS's claim; it is demanding that new facts be found, new rights adjudicated and a new judgment entered by a new tribunal.

This demand raises issues that must be analyzed in terms of separation of powers and resolved "in a manner

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[6] The United States argues that its position is supported by the International Emergency Economic Powers Act, 50 U.S.C. § 1702(a). Most of the lower courts, however, have found that the IEEPA does not augment any Executive authority to suspend claims. This is because the IEEPA confers authority only "with respect to property", and the authority conferred was intended to be limited to the realm of "economic" rather than judicial transactions. American Int'l Group, Inc. v. Islamic Repub. of Iran, Nos. 80-1779 & 80-1891 (D.C. Cir. May 22, 1981), slip op. at 27 n.15; Chas. T. Main Int'l, Inc. v. United States, No. 81-1176 (1st Cir. May 22, 1981), slip op. at 13-14 n.13; *Marschalk Co., supra*, slip op. at 17-30; *Electronic Data Sys. Corp. Iran, supra*, (N.D. Tex. June 7, 1981), slip op. at 20-21.

that preserves the essential functions of each branch." *United States v. Nixon*, 418 U.S. 683, 707 (1974). If jurisdiction conferred on the judiciary by the legislative branch is to be accorded its constitutional status, the exercise of that jurisdiction cannot be preempted by the Executive.

2. No action is more basic to the judicial function than the rendering of a judgment. Every other judicial act supports it in some way—by making its issuance possible in the first place, by assessing its correctness, by giving it effect. The ability "of a court to decide and pronounce a judgment and carry it into effect" is the essence of what courts do.[7]

The United States relies on prior claims settlements by executive agreement; yet until this year *no President acting alone had purported to "suspend," "nullify," or otherwise alter or undo a judgment of the co-equal judicial branch.*[8] There is no precedent for the action here. In other contexts, however, the Court has protected the authority of federal judgments. In *United States* v. *Peters*, 9 U.S. (5 Cranch) 115 (1809), for example, the Court held unconstitutional a State's nullification of a

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[7] Justice Samuel Miller, On The Constitution 314 (1891).

[8] The Government's primary authority, The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), involved a treaty; it was not the result of one branch acting alone. *Marschalk Co., supra*, slip op. at 51. Yet, even if the Algerian Declarations had been approved by Congress, The Schooner Peggy would still not be dispositive. The Court in 1801 did not have before it any constitutional challenge. 5 U.S. at 110. The only rights at stake in that case were those of the United States and the crew of a United States "public armed vessel." *Id.* at 105. And the Court made clear that, if unconstitutional, a treaty's "obligation [must be] denied." *Id.* at 110.

federal court judgment, Chief Justice Marshall declaring that

> [i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.

9 U.S. at 136. Particularly apt is the Court's admonishment in *United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1875), denying the United States' right to assert, and impose, a set-off against a claim that had already been adjudicated:

> [I] is clear that when such a claim as that preferred by the claimants in the original petition passes into judgment in a court of competent jurisdiction it ceases to be open, under any existing act of Congress, to revision by any one of the executive departments or of all such departments combined.

Id. at 648.

Even when an appeal is pending, the judgment of the trial court confers rights that may not be withdrawn. In *McCullough v. Virginia*, 122 U.S. 102 (1898), after a state court judgment was entered but before the appeal was resolved, the Virginia legislature enacted legislation withdrawing authorization for the suit. The Supreme Court refused to give effect to the intervening legislation:

> The writ of error to the Court of Appeals of the State brought the validity of that judgment into review, and the question presented to that court was whether at the time it was rendered it was rightful or not. If rightful, the plaintiff therein had a vested right which no state legislature could disturb. It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may

> abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

Id. at 123-24

It is the judicial branch, not the executive, that can overturn a judgment, even one on appeal, and require the claimant to start over:

> [I]n the federal courts the general rule has long been recognized that while appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its decisiveness and finality.

Huron Holding Corp v. Lincoln Mine Operating Co., 312 U.S. 183, 189 (1941). EDS's judgment is of even greater force because there is no supersedeas bond or other stay against it; it is today effective and enforceable.[9]

3. The judgment of this *amicus* is based on a full adversary trial, following which a federal court determined the applicable facts and the validity of EDS's commercial claim. Unless the facts found by the district court are clearly erroneous, they "may not be disturbed." *Campbell v. United States*, 373 U.S. 487, 493 (1963).

Finding facts and determining rights on the basis of an adversary presentation are also basic judicial func-

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[9] A provision in the Treasury regulations purports to prohibit the "entry of judgment." Even if valid, the regulation does not by its terms preclude the adjudication of facts and law on which a judgment is ultimately based. Significantly, moreover, this regulation has been construed to apply only to a judgment *which itself transfers an interest in property*, not a judgment adjudicating rights and liabilities; for the IEEPA confers authority only "with respect to property"—any other construction would violate the separation of powers. National Airmotive Corp. v. Government of Iran, 499 F. Supp. 401, 405 (D.D.C. 1980); Vishipco Line v. Chase Manhattan Bank, No. 77-1251 (S.D.N.Y. Nov. 3, 1979), slip op. at 5.

tions on which the Executive may not intrude. If the President could settle or suspend a case after the facts have been determined, he would implicitly have the power to alter a result—removing a case from the federal courts if the foreign state loses but not if it wins. In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), this Court held unconstitutional a statute forbidding the use at trial of Presidential pardons as proof of loyalty to the Union. The law was held infirm because it intruded on the courts' fact-finding function; Congress may not forbid a court "to give the effect to evidence which, in its own judgment, such evidence should have." *Id.* at 147. And as recently as *United States v. Nixon*, *supra*, this Court held that claims of executive privilege must give way to the courts' fact-finding needs.

In *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), this Court was faced with a statute that appeared to permit judicial review of administrative action while granting the President unreviewable discretion to revise the same action. The Court, in refusing to construe the statute as granting jurisdiction subject to Executive revision, held federal court judgments immune from Executive interference:

> [I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.

Id. at 113.[10] Yet in this case the Executive asserts a

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[10] The decision invokes twin principles: the courts will not intrude on fact-finding by the President in his area of competence (333 U.S. at 111); adjudications by the courts may not be "sub-

power to review and revise by executive order every judgment, every judicial ruling, and every finding of fact rendered under the Foreign Sovereign Immunities Act. This position would render decisions under that Act advisory opinions at best and expensive and distracting nullities at worst.

4. The full sweep of the Government's position would have an immense effect on the constitutional balance of power, as the recent courts of appeals decisions readily acknowledge. The First Circuit made its reservations plain:

> We need not and do not hold that the executive possesses plenary power to settle claims, even as against foreign governmental entities. It may be that much of this area is within that 'zone of twilight in which [the President] and Congress may have concurrent authority.' *Youngstown*, *supra*, 343 U.S. at 637. The sheer magnitude of such a power, considered against the background of the diversity and complexity of modern international trade, cautions against any broader construction of authority than is necessary.

Chas. T. Main, *supra*, slip op. at 22.

The decision of the District of Columbia Circuit explicitly recognized the "separation-of-powers problems raised by an executive effort to affect the outcome of a pending case" and concluded that the Government's request to vacate the partial summary judgment entered there was an "intrusion on the judicial process . . . not

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ject to later review or alteration by administrative action"— otherwise they become impermissible "advisory opinions" (*id.* at 113-14).

Judge Porter is of the same view, finding that the Executive's assertions of power here would render "the orders and judgments of courts acting pursuant to express Congressional grants of jurisdiction mere advisory opinions." *Electronic Data Sys. Corp. Iran*, *supra*, (N.D. Tex. June 7, 1981), slip op. at 25.

warranted by the terms of the executive agreements, implementing executive orders, or the relevant regulations." *American International Group, supra*, slip op. at 35.[11]

It is thus surprising that the United States seeks here a quick endorsement of these unprecedented powers while asserting "that these questions are not particularly difficult" (Mem. Resps. at 10). For, whatever the Executive's asserted authority to interfere with the express jurisdiction of article III courts[12]—an assertion itself contrary to constitutional requirements—it surely does not encompass a negation of the entire gamut of the judicial process represented by EDS's judgment.

II. THE EXECUTIVE DOES NOT HAVE THE POWER TO NULLIFY OR NEGATE A PRE-FREEZE ATTACHMENT OF FUNDS HELD *IN CUSTODIA LEGIS*

The Executive's assertions raise a second issue, one unique to EDS: the power of the Executive to nullify or effectively negate a court-ordered pre-freeze attachment of funds, particularly where the funds are vested in the court. The issue centers on broad and varying positions

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[11] The opinions of the district courts are more blunt. Judge Duffy concluded that the suspension of claims would permit a President to "dictate the jurisdictional bounds" of United States courts, and thus violated the separation of powers. *Marschalk Co., supra*, slip op. at 56-57. Judge Porter said that, as applied to EDS's judgment, this assertion of power "would leave the judiciary subject to the unbridled whims of the Executive Branch . . . ." *Electronic Data Sys. Corp. Iran, supra*, (N.D. Tex. June 7, 1981), slip op. at 25.

[12] 28 U.S.C. §§ 1330 and 1605(a) (1976). The Second Circuit has recently issued a comprehensive opinion on this grant of jurisdiction, noting Congress' "true concern" that courts be mindful of its policy of providing "access to the courts" for claims against foreign states. Texas Trading & Milling Corp. v. Federal Repub. of Nigeria, No. 80-7703 (2d Cir. April 16, 1981).

taken by the Executive in its effort to legitimize a nullification of court-ordered attachments. The fluctuating positions it has taken on the EDS pre-freeze attachment illustrate the vice of the power asserted.

1. EDS5s final judgment was secured by a prejudgment Order of Attachment entered after a contested hearing in the United States District Court for the Southern District of New York on June 13, 1979. Pursuant to that Order, the District Court formally took custody [13] of some $20 million of funds of the Government of Iran, more than five months *before* the Executive's "freeze" of Iranian assets under the IEEPA. On the day following imposition of the freeze, the United States formally notified the Court of Appeals for the Second Circuit [14] that the freeze and the regulations promulgated thereunder had not affected the validity of the Order of Attachment entered by the District Court and that the regulations' prohibition against unlicensed attachments "is prospective only" and "does not nullify or void the preexisting attachment here." [15]

The Executive altered its stance following the Algerian Declarations. By Executive Order 12279, it directed the

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[13] These funds are held in a renewable certificate of deposit by and in the name of the United States Marshal in custody for the Southern District of New York.

[14] The attachment order was then on appeal to the Second Circuit. Electronic Data Sys. Corp. v. Social Security Organization of Iran, 610 F.2d 94 (2d Cir. 1979). The order of attachment is in full effect today.

[15] Indeed, the Federal and Iranian Respondents successfully opposed EDS's petition for certiorari before judgment on the ground that EDS was "unique" because it "was one of the very few claimants that instituted suit and obtained attachments *prior* to the November 14, 1979 blocking order." (Memorandum for the Federal Respondents in Opposition, No. 80-2035, June, 1981, at 8 n.8; *see* Iran Brief in Opposition, June 3, 1981, at 7, 13-14.) The United States pointed out that the "vast bulk of the over 400 Iranian cases involve suits filed, and attachments obtained, *after* November 14, 1979."

transfer of all Iranian related assets, including those covered by the EDS attachment. 46 Fed. Reg. 7919 (1981). The following month, President Reagan issued Executive Order 12294, 46 Fed. Reg. 14111 (1981), and implementing regulations, providing that any funds "subject to a valid attachment" *not* affected by the revocation of licenses of post-freeze attachments—a category virtually limited to the funds attached by EDS—"need not be transferred as otherwise required" by the Regulations. 31 C.F.R. § 535.213(c). The United States has said [16] that the EDS attachment will not be transferred by July 19, 1981.[17]

The new regulations, however, effectively negate EDS's attachment—without expressly nullifying it—by prohibiting all persons from "exercising any right, power or privilege, by court order, attachment, or otherwise," as to property in which Iran has certain described interests and which property, according to the Federal Respondents, includes EDS' attached funds. 31 C.F.R. § 535.218. Implied in this regulation is the asserted

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[16] In response to the June 4, 1981 Regulations directing transfer of all Iranian assets by June 19, 1981 (31 C.F.R. § 535.213(b)), the United States informed this Court that "the assets subject to the attachment petitioner [EDS] obtained in New York" "need not be transferred" by June 19, 1981. (Supplemental Memorandum for the Federal Respondents, No. 80-2035, June, 1981 at 5); and that a custodian who "chooses to transfer [EDS'] assets in contravention of the terms of an order of attachment would not be insulated from liability for that transfer." (*Id.* at 5 n.7.)

[17] Based on representations that the Executive orders and regulations "do not impinge upon the continued validity" of the Order of Attachment, the District Court for the Northern District of Texas has held that the attachment "obtained by [EDS] prior to the institution of freeze regulations is unaffected by those regulations, as well as Executive Order 12279." *Electronic Data Systems Corp. Iran, supra,* (N.D. Tex. June 7, 1981), slip op. at 17. The expansive ruling the Executive now seeks could affect this ruling as well.

power to prevent a judgment holder like EDS, with an attachment pre-dating the freeze, from satisfying its judgment. This is apparently a power as to which the Federal Respondents now seek a ruling from this Court removing "any remaining uncertainty about the validity of Executive orders *and regulations* implementing the Agreement with Iran" (Mem. Resps. at 9, emphasis added).

2. The Executive asserts a power that would permit it to negate *all* attachments involving Iranian assets—including a power to neutralize funds covered by the EDS attachment. Yet, those funds were placed in the custody of the district court long before the freeze, where they are held today *in custodia legis* to satisfy a final judgment issued by a federal court. In *Ex parte Tyler*, 149 U.S. 164 (1893), this Court held that property in the possession of a federal Circuit Court-appointed receiver was not amenable to seizure and levy under process issued from a state court to enforce state tax collection, without consent of the Circuit Court. The Supreme Court explained:

> The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis*, and that unauthorized interference with such possession is punishable as a contempt, is conceded . . . . The maintenance of the system of checks and balances characteristic of republican institutions requires the coordinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle.

149 U.S. at 182-83.[18]

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[18] *Accord*, Converse v. Highway Constr. Co. of Ohio, 107 F.2d 127, 130 (6th Cir. 1939) (The rule of non-interference with property in the possession of the court without first obtaining the court's con-

Nothing in the prior decisions of this Court, or in the lower court decisions upholding the Executive's nullification of *post*-freeze attachments, supports the power the Government urges here. The First Circuit specifically eschewed any decision affecting pre-freeze attachments—the "issue of presidential power to nullify judicially created interests . . . *retroactively*." *Chas. T. Main*, *supra*, slip op. at 10.

Similarly, this Court addressed post-freeze attachment orders in *Orvis v. Brownell*, 345 U.S. 183 (1953), where "the question [was] not whether a lien, concededly valid because obtained prior to the freezing order, may be 'annulled' by the [Executive] but rather whether the freezing order prevented the subsequent acquisition, by attachment, of such a property interest as the [Executive] would have to recognize . . . ." 345 U.S. at 188. Thus in *Orvis* the Court preserved the entire domain of pre-freeze attachments. The power asserted here would not only encompass a power to nullify retroactively a pre-freeze court order, but a court's custody of funds as well. If it is to be addressed in a ruling as the United States urges, such an unprecedented power cannot be sustained.

CONCLUSION

This Court has previously invoked the counsel of the Founding Fathers against adopting, in times of heated urgency, broad precedents which have far-reaching consequences. *United States v. Brown*, 381 U.S. 437, 444 (1965); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). In view

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sent is "of such importance to the interest and safety of the public and the administration of justice that it should be inflexibly maintained on all occasions."); In re Rubin, 242 F. Supp. 408, 412 (E.D. Pa. 1965).

of their constitutional infirmities, the assertions of Executive power raised in this case should not be upheld.

Dated: June 18, 1981

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief *Amicus Curiae* of Electronic Data Systems Corporation Iran In Support of Dames & Moore, and Motion for Leave to File Brief *Amicus Curiae*, have been served this 19th day of June, 1981, in the manner indicated:

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No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership, *Petitioner,*

v.

DONALD T. REGAN, the Secretary of the Treasury of The United States of America, THE UNITED STATES OF AMERICA, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION OF FLAG, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF

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No. 80-2078

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OCTOBER TERM, 1980

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v.

DONALD T. REGAN, the Secretary of the Treasury of The United States of America, THE UNITED STATES OF AMERICA, *et al., Respondents.*

MOTION OF FLAG, INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

FLAG, Inc., hereby moves for leave to file a brief *amicus curiae,* pursuant to Rule 36, in order to apprise the Court of the interest of its members, the former American hostages in Iran and their families, in certain of the issues before the Court in this case. All of the parties except the intervening Iranian governmental entities have consented to FLAG's filing an *amicus* brief. The proposed *amicus* brief is attached hereto.

As is fully explained at pages 1-4 of the attached brief, FLAG clearly has an interest in the present case. The former hostages and their families had good and valuable claims against the Government of Iran which were extinguished by the Executive Orders and Treasury

Regulations implementing the Algiers Agreement, and the validity of that Agreement and of those Orders and Regulations is being challenged in the case before the Court.

If the former hostages and their families bring actions in the Court of Claims, they will argue that when the Government extinguishes, without recourse, valid claims of United States citizens against a foreign sovereign because of foreign-policy considerations, rather than settling or compromising such claims in the interest of the claimants, a taking of property has occurred which requires just compensation within the meaning of the Fifth Amendment to the Constitution. They will also argue that under the Tucker Act, 28 U.S.C. § 1491, the Court of Claims has jurisdiction over such a "taking" claim notwithstanding 28 U.S.C. § 1502, which provides that the Court of Claims does not have jurisdiction over any claim against the United States "growing out of or dependent upon" a treaty.

The question whether the Court of Claims has jurisdiction to hear such a "taking" case is present in the case before the Court because of the challenge to the constitutionality of the Algiers Agreement. Petitioner Dames & Moore explicitly raised the "taking" issue in its petition for certiorari (p. i). It thus necessarily, though implicitly, raised the Section 1502 jurisdictional issue. If a remedy for a taking is available through a Court of Claims action, then the taking itself is not unconstitutional. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

The issue presented by the instant case concerning the jurisdiction of the Court of Claims to entertain actions for compensation for takings effected in the aftermath of the Algiers Agreement is the primary reason for

the filing of this motion for leave to file an *amicus* brief. For the former hostages and their families, whose claims against Iran have been unequivocally extinguished with no legal remedy substituted, the availability of Court of Claims relief notwithstanding Section 1502 is crucial. In addition, hostage "taking" claims will involve an issue concerning when and how the Algiers Agreement became effective. (*See* attached brief, p. 8, n. 4.) While that issue is not directly involved in the present case, it is important that the Court be aware of it if only to avoid language that might unintentionally prejudice claims not yet before the Court.

Because at least one court which considered the Court of Claims jurisdictional issue in the context of the Iranian cases decided that issue without explanation in a manner detrimental to the interests of the former hostages and their families (*see* p. 10 of the attached brief), because the interests of commercial claimants such as petitioner Dames & Moore (who may have access to the Iran-United States Claims Tribunal established by the Algiers Agreement) may not be the same as the interests of the former hostages and their families, and because there is no assurance that any of the parties to the present case will address these issues in depth, FLAG believes that the issues addressed in the attached brief may not be adequately presented by the parties before

the Court. FLAG therefore respectfully requests permission to file a brief *amicus curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. The Extinguishment of a Valid Cause of Action Against a Foreign Sovereign for Foreign-Policy Reasons Is a Taking of Property Which Violates the Constitution Unless Compensation Is Available Through a Court of Claims Action 5

II. Section 1502 Does Not Preclude Actions for Compensation Based on the Taking of Claims Against Iran 10

CONCLUSION 15

TABLE OF AUTHORITIES

CASES:	PAGE
Agee v. *Muskie*, 629 F.2d 80 (D.C. Cir.) (MacKinnon, J., dissenting), *cert. granted*, 101 S.Ct. 69 (1980) (No. 80-83)	6
Aris Gloves, Inc. v. *United States*, 420 F.2d 1386 (Ct. Cl. 1970) (Nichols, J., concurring)	8
Blagge v. *Balch*, 162 U.S. 439 (1896)	8
Cushing v. *United States*, 22 Ct. Cl. 1 (1886)	8
Eastern Extension, A. & C. Telegraph Co. v. *United States*, 231 U.S. 326 (1913)	13
Ex parte Collett, 337 U.S. 55 (1949)	6
Falcon Dam Constructors v. *United States*, 136 Ct. Cl. 358 (1956)	13
Gray v. *United States*, 21 Ct. Cl. 340 (1886)	8
Holbrook v. *United States*, 21 Ct. Cl. 434 (1886)	8
Hughes Aircraft Co. v. *United States*, 534 F.2d 889 (Ct. Cl. 1976)	12
Judgment on the Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. *Iran)*, I.C.J. (May 24, 1980)	5
Langford v. *United States*, 101 U.S. 341 (1879)	8
Mallett v. *North Carolina*, 181 U.S. 589 (1901)	6
Marschalk Co. v. *Iran National Airlines Corp.*, No. 79-Civ.-7035 (CBM), slip op. (S.D.N.Y. June 11, 1981)	10
27 Op. Att'y Gen. 327 (1909)	8
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	7, 11
Societe Anonyme des Ateliers Brillie Freres v. *United States*, 160 Ct. Cl. 192 (1963)	12
United States v. *Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 879 (1973)	6

Table of Authorities Continued

CASES: PAGE

United States v. *Johnson*, 323 U.S. 273 (1944) 11

United States v. *Old Settlers*, 148 U.S. 427 (1893) 12

United States v. *Pizzarusso*, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968) 6

United States v. *Weld*, 127 U.S. 51 (1888) 12

STATUTES:

Tucker Act, 28 U.S.C. § 1491 ..... 9, 12

28 U.S.C. § 1502 ..... 4 *et passim*

28 U.S.C. § 1603(c) 6

28 U.S.C. § 1605(a)(5) 5, 6

International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* (Supp. 1979) 14

PENDING LEGISLATION:

S. 269, Bill To Amend 28 U.S.C. Relating to Federal Court Jurisdiction over Cases Arising from Acts of International Terrorism, Jan. 27, 1981, Introduced by Senator Dole 6

TREATIES AND EXECUTIVE AGREEMENTS:

Article 52, Vienna Convention on the Law of Treaties, 8 Int'l L. Materials 679 (1969) 9

Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 Int'l L. Materials 224 (1981): ..... 2 *et passim*

EXECUTIVE ORDERS AND FEDERAL REGULATIONS:

Executive Order 12283, Jan. 19, 1981, 46 Fed. Reg. 7927 (Jan. 23, 1981) 2

Table of Authorities Continued

EXECUTIVE ORDERS AND FEDERAL REGULATIONS: PAGE

Executive Order 12285, Jan. 19, 1981, 46 Fed. Reg. 7931 (Jan. 23, 1981) 3

Executive Order 12294, Feb. 24, 1981, 46 Fed. Reg. 14,111 (Feb. 26, 1981) 3, 14

Executive Order 12307, June 4, 1981, 46 Fed. Reg. 30483 (June 9, 1981) 3

Iran Assets Control Regulations, 46 Fed. Reg. 14,334 (Feb. 26, 1981) (to be codified as 31 C.F.R. § 535.216) 3

MISCELLANEOUS:

Commentary on the 1966 draft of Article 49, II Y.B. Int'l L. Comm'n 246-47 (1966), *quoted in* 14 Whiteman, Digest of International Law 273 (1970) . 9

W. Cowles, *Treaties and Constitutional Law: Property Interferences and Due Process of Law* 221 (1941) ... 8

Declaration of Alexander M. Haig, Jr., Secretary of State, Feb. 24, 1981 8

Statement of Interest in *American International Group* v. *Islamic Republic of Iran*, Nos. 80-1779 and 80-1891, D.C. Cir., filed February 1981, *as reprinted in* Iranian Assets Litigation Reporter 2530, 2556 (March 10, 1981) 9, 14

"Void *Ab Initio*: The U.S.-Iran Hostage Accords," 21 Va. J. Int'l L. 347 (1981) 9

White House Press Release, President Reagan to the Congress, Feb. 24, 1981 8

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BRIEF OF *AMICUS CURIAE* FLAG, INC.

FLAG, Inc., files this *amicus* brief to apprise the Court of the interest of its members, the former American hostages in Iran and their families, in certain of the issues before the Court in these cases.

INTEREST OF THE *AMICUS CURIAE*

FLAG, Inc., is a nonprofit organization which was incorporated in the District of Columbia on May 9, 1980, in succession to Family Liaison Action Group, an unincorporated association formed soon after the hostage taking on November 4, 1979. FLAG's original members were the wives and parents of the American hostages then held in Iran. Since the hostage release on January 20, 1981, the former hostages have also become members.

FLAG's purposes, as defined in its Articles of Incorporation, are:

> "to educate the general public about the international crisis caused by the taking of hostages at the American Embassy and at the Iranian Foreign Ministry in Tehran, Iran on November 4, 1979 (hereinafter referred to collectively as 'Hostages'); to assist in resolving that crisis by seeking the release of the Hostages by means consistent with United States law and policy; to secure humane treatment for the Hostages while awaiting their release; to secure the human rights of the Hostages as guaranteed by international law and the customs of nations; to provide for the assimilation of the Hostages into a normal life with dignity and honor upon their release; to provide a means of communication among the families of the Hostages that will enable them to share experiences and information; to acquire and disseminate to the public information that may prove useful in resolving both the current Hostage crisis and any similar situations in the future; and to make charitable contributions to the Hostages and their families in case of need."

While several former hostages or their families have filed suit against Iran (some before and some after the Algiers Agreement[1] was executed), the great majority have not. Before January 20, 1981, the hostage families were most reluctant to sue — a reluctance that was strongly encouraged by the State Department — lest the Iranians be inflamed and the release of the hostages jeopardized. The Algiers Agreement provides that the United States will "bar and preclude" all such hostage claims against Iran (General Declaration, ¶ 11). President Carter's Executive Order 12283 of January 19,

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[1] Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 Int'l L. Materials 224-28 (1981).

1981, 46 Fed. Reg. 7927 (Jan. 23, 1981), directed the Secretary of the Treasury to promulgate regulations "prohibiting any person subject to U.S. jurisdiction from prosecuting in any court within the United States or elsewhere any claim against the Government of Iran arising out of events . . . relating to (1) the seizure of hostages on November 4, 1979, (2) their subsequent detention . . . ." The Secretary has issued such regulations. Iran Assets Control Regulations, 46 Fed. Reg. 14,334 (Feb. 26, 1981) (to be codified as 31 C.F.R. § 535.216). Executive Order 12283, along with President Carter's other orders implementing the Algiers Agreement, was "ratified" by President Reagan's Executive Order 12294 of February 24, 1981, 46 Fed. Reg. 14,111 (Feb. 26, 1981).

Another of President Carter's actions of January 19, 1981, Executive Order 12285, 46 Fed. Reg. 7931 (Jan. 23, 1981), established the President's Commission on Hostage Compensation, to make recommendations to the President within ninety days as to whether the United States should provide financial compensation to the hostages and, if so, how it should be determined and what if any legislation would be appropriate. Notwithstanding the ninety-day deadline (extended to August 20, 1981, by Executive Order 12307, of June 4, 1981, 46 Fed. Reg. 30483 (June 9, 1981)), the Commission is only now in the process of being organized and has not yet held any proceedings or deliberations.

It will be argued on behalf of the former hostages and their families before the President's Commission, before Congress, and if necessary in the Court of Claims that the hostages and their families had good and valuable causes of action against the Government of Iran which have been taken from them by the United States,

and that the value of those claims should be taken into consideration in any determination — whether administrative, legislative or judicial — of the amount of compensation to be paid the hostages and their families. Since certain of the issues involved in the present proceeding are relevant to these contentions, FLAG files this *amicus* brief to apprise the Court of the interest of the former hostages and their families in the relevant issues and to state its position concerning them.

It cannot presently be said which side this brief supports because the positions the respective parties will take on the issues of concern to *amicus* are not now known with certainty.

SUMMARY OF ARGUMENT

(1) When the Government extinguishes valid claims of United States citizens against a foreign sovereign because of foreign-policy considerations, rather than settling or compromising such claims in the interests of the claimants, a taking of property has occurred which is constitutional only if just compensation may be sought and, if owing, obtained by judicial remedy.

(2) Court of Claims jurisdiction of actions by plaintiffs whose claims against Iran have been extinguished or barred from the courts is not precluded by 28 U.S.C. § 1502. Section 1502 applies only when a right of action is founded on and created by an international agreement, which is not the case here. Moreover, Section 1502 is not applicable where, as here, the international agreement is non-self-executing and the actual taking was effected by Executive Orders and Treasury Regulations.

ARGUMENT

I. The Extinguishment of a Valid Cause of Action Against a Foreign Sovereign for Foreign-Policy Reasons Is a Taking of Property Which Violates the Constitution Unless Compensation Is Available Through a Court of Claims Action.

The seizure and detention of the hostages created causes of action on behalf of them and their families for, *inter alia,* kidnapping, false imprisonment and violations of federal statutes, international law and treaty rights. The International Court of Justice has held that the Government of Iran is responsible for the hostage seizure and is "under an obligation to make reparation to the Government of the United States" therefor, with the form and amount of such reparation to be determined later. *Judgment on the Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States* v. *Iran*), I.C.J., ¶¶ 90, 95 (May 24, 1980). That further determination was aborted when the United States had the case terminated, implementing the provision of the Algiers Agreement (General Declaration, ¶ 11) which required the United States to withdraw its claims before the International Court of Justice.

The hostage causes of action against Iran could have been brought in the United States district courts, though for reasons already explained only a few were in fact so brought; and they could be brought today had they not been barred by action of the Executive. Jurisdiction would lie, and the sovereign immunity of the Government of Iran would be waived, by virtue of 28 U.S.C. § 1605(a)(5), permitting actions "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tor-

tious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment . . . ." The term "United States" in Section 1605(a)(5) is defined to include "all territory and waters . . . subject to the jurisdiction of the United States." 28 U.S.C. § 1603(c). A United States embassy abroad is "subject to the jurisdiction of the United States" for many purposes. *United States* v. *Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 879 (1973); *Agee* v. *Muskie*, 629 F.2d 80, 111, 115-16 (D.C. Cir.) (MacKinnon, J., dissenting), *cert. granted*, No. 80-83, 101 S.Ct. 69 (1980); *United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968). The embassy in Tehran is therefore within the statutory definition.[2]

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[2] Even if 28 U.S.C. § 1605(a)(5) were held to exclude claims arising in United States embassies abroad, it is reasonable to believe that in the absence of the Algiers Agreement Congress would have acted to rectify what surely would have been recognized as an oversight on its part if the Foreign Sovereign Immunities Act turned out not to permit actions on claims like those of the hostages. Indeed, legislation to provide such express jurisdiction, S. 269, is now pending. Being jurisdictional, such legislation could readily be given retroactive effect. *See, e.g., Ex parte* Collett, 337 U.S. 55, 71 (1949); Mallett v. North Carolina, 181 U.S. 589 (1901). Finally, even if the courts of the United States were held closed to hostage claims by virtue of a narrow reading of Section 1605(a)(5), remedies elsewhere would have been available. The International Court of Justice had already indicated that it would award damages to the United States on account of the hostage claims, *supra*. And the courts of other States might well have been available, especially since the claims are grounded, *inter alia*, on violations of fundamental principles of international law of wide concern among most nations. (A number of American commercial claimants against Iran have obtained *quasi in rem* jurisdiction of their claims in European courts.)

Assuming the validity of the relevant provisions of the Executive Orders and Treasury Regulations which implemented the Algiers Agreement, the hostage claims have unquestionably been extinguished by the United States. In contrast to the commercial claimants, who may have recourse to the Iran-United States Claims Tribunal established by the Algiers Agreement, hostage claims against Iran are "barred and precluded" from any court whether in this country or abroad, and no substitute judicial remedy is provided. FLAG takes no position on whether implementation of the provisions of the Algiers Agreement dealing with lawsuits and claims violates the constitutional principle of separation of powers. FLAG does contend, however, that the extinguishment of hostage claims against Iran without recourse constitutes a taking of property which requires just compensation within the meaning of the Fifth Amendment to the Constitution. If a remedy for that taking is available through a Court of Claims action, then the taking itself is not unconstitutional. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). The issue in the instant case concerning the jurisdiction of the Court of Claims to entertain actions for compensation for takings effected in the aftermath of the Algiers Agreement is the primary reason for the filing of this *amicus* brief.[3]

When the United States extinguishes causes of action against a foreign sovereign, and when its purpose in

[3] That question is not explicitly raised in Dames & Moore's petition for certiorari, but is implicitly and necessarily involved since Dames & Moore does raise the "taking" issue, Petition at i, and the *Rail Cases* make the availability of Court of Claims relief the decisive factor. The petition in American Bell International Inc. v. Islamic Republic of Iran, *et al.*, No. 80-2111, squarely raises the Court of Claims jurisdictional issue (pp. 17-18).

so doing is not a settlement or compromise of the claims in question but some unrelated foreign-policy purpose of the Government, compensation is due for a taking of property. *Gray* v. *United States*, 21 Ct. Cl. 340 (1886); *Cushing* v. *United States*, 22 Ct. Cl. 1 (1886); *Holbrook* v. *United States*, 21 Ct. Cl. 434 (1886); *see Aris Gloves, Inc.* v. *United States*, 420 F.2d 1386, 1395-97 (Ct. Cl. 1970) (Nichols, J., concurring); *Langford* v. *United States*, 101 U.S. 341, 344 (1879); 27 Op. Att'y Gen. 327 (1909); W. Cowles, *Treaties and Constitutional Law: Property Interferences and Due Process of Law* 221 (1941). *But cf. Blagge* v. *Balch*, 162 U.S. 439 (1896).[4]

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[4] This is not the time to argue the merits of the hostage claims for just compensation, but we observe in passing, to show *amicus'* substantial interest, that the hostages are not necessarily precluded from meeting the test of *Gray* and *Aris Gloves* by reason of the fact that agreement by the United States to take action to extinguish their claims was necessary to procure their release from Iran and was therefore done for their benefit. That it was necessary on January 19, 1981, we do not doubt. But President Reagan, after a careful review and at a time when the hostages were safe, determined to carry out the Agreement on the ground that observance of its remaining executory provisions was in the foreign-policy interests of the United States. "Although the hostages have been released," he declared, "financial and diplomatic aspects of the crisis have not yet been resolved and continue to present an unusual and extraordinary threat to the national security, foreign policy and economy of the United States." President Reagan to the Congress, February 24, 1981, White House Press Release. "The Administration has determined . . . that the United States should implement these agreements because they are in the interest of the United States. They represent the surest way of resolving many of the financial problems between the United States and Iran consistent with the interests of U.S. claimants and the broader interests of the United States in the Persian Gulf area, a region of strategic importance to the United States." Declaration of Alexander M. Haig, Jr., Secretary of State, February 24, 1981, filed with United States Statements of Interest in various Iranian cases (*e.g.*, in American

Aside, therefore, from separation-of-powers questions, on which FLAG takes no position, the case before the Court should turn on whether the Tucker Act, 28 U.S.C. § 1491, is available to provide Court of Claims jurisdiction for causes of action against the United States founded on the assertion that the extinguishment of claims against Iran (or their exclusion from the courts) constitutes a compensable taking. The United States has argued that the issue is premature, but has reserved its position that 28 U.S.C. § 1502 deprives the Court of Claims of jurisdiction over such actions. Most of the

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International Group v. Islamic Republic of Iran, Nos. 80-1779 and 80-1891, D.C. Cir., filed February 1981, *as reprinted in* Iranian Assets Litigation Reporter 2530, 2556 (March 10, 1981)).

It can be forcefully argued that the Algiers Agreement of January 19, 1981, was void *ab initio* because its acceptance by the United States was compelled through the exercise of duress (the taking and holding of the hostages) in violation of fundamental principles of international law. Article 52, Vienna Convention on the Law of Treaties, 8 Int'l Legal Materials 679 (1969); *see* "Void *Ab Initio:* The U.S.-Iran Hostage Accords," 21 Va. J. Int'l L. 347 (1981). If a State determines, once the duress exercised against it has been removed, to adhere to an agreement originally entered into under duress, the validity of the agreement derives from that subsequent determination and not from the originally void undertaking. Commentary on the 1966 draft of Article 49, II Y.B. Int'l L. Comm'n 246-47 (1966), *quoted in* 14 Whiteman, Digest of International Law 273-74 (1970). The Algiers Agreement that was effective so far as claims extinguishment is concerned was therefore made by President Reagan after the release of the hostages and for reasons entirely other than their welfare.

The issue whether the Algiers Agreement became effective and binding on January 19, 1981, or, as we contend, only upon President Reagan's decision the following month to observe it is not involved in the case before the Court, and we trust the Court's opinion will contain nothing that would preclude the former hostages from raising the point when their own claims are considered.

courts that have ruled on the constitutionality of the Algiers Agreement have found the "taking" issue, and therefore its Section 1502 aspect, premature on the ground that, as to commercial claims, it is too early to know whether domestic causes of action against Iran have been replaced by rights of equal value. Judge Duffy did reach the issue and held, without analysis, that Section 1502 precludes Court of Claims jurisdiction. *Marschalk Co.* v. *Iran National Airlines Corp.*, No. 79-Civ.-7035 (CBM), slip op. at 84 (S.D.N.Y. June 11, 1981).

For the former hostages and their families, whose claims against Iran have been unequivocally extinguished with no other legal remedy substituted, the availability of Court of Claims relief notwithstanding Section 1502 is crucial. If the Court should reach that issue in the present case, we respectfully request that the following arguments be considered.

II. Section 1502 Does Not Preclude Actions for Compensation Based on the Taking of Claims Against Iran.

The statute which the Government has alleged, in Statements of Interest filed with various courts in the Iranian cases, may preclude Court of Claims jurisdiction reads in its entirety as follows:

> "Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations." 28 U.S.C. § 1502.

For two independent reasons, this provision does not prevent Court of Claims jurisdiction over an action for a constitutional taking by some one whose claim against Iran has been extinguished, terminated, suspended or

otherwise removed from the jurisdiction of United States courts.

Preliminarily, we observe that a contrary reading would present grave constitutional issues. If the Executive may wipe out property rights in the absence of jurisdiction in any court to determine whether compensation is owing, its actions would have to be subjected to the most critical scrutiny and could not stand if a taking were held to have occurred. When a statute is ambiguous, "construction should go in the direction of constitutional policy." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944), *quoted with approval in Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974). As this Court held in the *Rail Cases*, " 'when one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if language . . . and arguably the legislative history point somewhat more strongly in another way.' " In that case, as here, the issue was whether statutory language precluded Court of Claims jurisdiction of a "taking" action.

An even more compelling case is presented when, as here, the executive action in question involves foreign-affairs matters of great national moment. If no right to seek compensation is available to those deprived of claims, the only judicial recourse is to examine the executive action alleged to constitute a taking and, if it is found that it does, to nullify it, with possible serious embarrassment to the Government's international position and harm to important national interests. If Section 1502 precludes claims based on takings that involve the exercise of the foreign-affairs power, then a constant risk would be presented that executive acts highly necessary to serve the nation's global purposes would have to be

overturned. The Tucker Act, if available, is a safety valve that avoids so dangerous a prospect.

These are forceful reasons to interpret the general language of Section 1502 as not precluding Tucker Act jurisdiction in the circumstances involved in the Iranian cases.[5] Fortunately, the courts have construed the section in a way fully compatible with such jurisdiction. In order to be precluded by Section 1502, the right upon which a claim is founded must "have its origin — derive its life and existence — from some treaty stipulation." *United States* v. *Weld*, 127 U.S. 51, 57 (1888); *accord, United States* v. *Old Settlers,* 148 U.S. 427, 468-69 (1893). "[A] case growing out of a treaty is one involving rights given or protected by a treaty . . . ." *Societe Anonyme des Ateliers Brillie Freres* v. *United States*, 160 Ct. Cl. 192, 196-99 (1963). A claim is not barred by Section 1502 merely because it would not have arisen "but for" a treaty. *Hughes Aircraft Co.* v. *United States*, 534 F.2d 889 (Ct. Cl. 1976).

Congress, it has thus repeatedly been held, intended in Section 1502 to bar only suits based on assertions that some language in a treaty, without more, expressly or implicitly conferred a right to a payment from the United States that was enforceable by a Court of Claims action. "By [Section 1502] Congress has withdrawn from litigation questions as to whether the United States has

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[5] These reasons might also lead to a reading of Section 1502 as applying only to formal treaties, not to executive agreements such as that involved here. It has been held that "treaty" as used in Section 1502 includes executive agreements, Hughes Aircraft Co. v. United States, 534 F.2d 889 (Ct. Cl. 1976); but the serious constitutional implications of such a holding in cases such as the present might warrant reassessment if other grounds for reaching the constitutionally desirable result were not readily available.

done what it agreed by treaty to do." *Falcon Dam Constructors* v. *United States*, 136 Ct. Cl. 358, 364 (1956). "It is [the predecessor of Section 1502]'s evident purpose that the obligations of the United States directly resulting from a treaty should not be determined by the Court of Claims." *Eastern Extension, A. & C. Telegraph Co.* v. *United States*, 231 U.S. 326, 333 (1913).

Here, of course, the right that would be asserted in the Court of Claims — the right to compensation for a taking of property — is created by the Constitution and not by any treaty. The only involvement of an international agreement is that by entering into the Algiers Agreement the President promised to a foreign state that he would take that action which, once taken, arguably constitutes the taking of property. In no sense does the cause of action "derive its life and existence" from the Algiers Agreement. We have found no case in which Section 1502 has been held to preclude an action because the wrong complained of, rather than the right asserted, had some treaty connection.

There is an even simpler, equally conclusive, and independent reason why Section 1502 does not bar Court of Claims actions of the sort in question here. The Algiers Agreement is patently not self-executing. No claims or actions were terminated by the Agreement itself; the United States merely agreed to take steps to terminate them. As to the commercial claims involved in the instant case, the United States "agrees to terminate all legal proceedings . . ., to nullify all attachments . . . , [and] to prohibit all further litigation . . . ." Algiers Agreement, General Declaration, General Principle B. As to the hostage claims, the United States agreed to "promptly withdraw" the claims pending before the International Court of Justice, and "will thereafter bar

and preclude" such claims in domestic courts and elsewhere.

None of this, of course, had any self-executing effect. Executive Orders and Treasury Regulations were necessary to carry out these obligations and to give them any impact in domestic law.[6] It is those Executive Orders and Treasury Regulations, not the Algiers Agreement itself, which the United States has urged should be given effect by the courts. Nor do the orders and regulations even depend for their validity on the Algiers Agreement; the United States has consistently taken the position that they derive their authority from the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701 *et seq.* (Supp. 1979). It is the provisions of the Executive Orders and Treasury Regulations, not of the Algiers Agreement, which control in domestic law.[7] Thus a Court of Claims case of the sort here relevant would not require any reference to the Algiers Agreement or construction of its terms. The alleged taking would be founded solely upon the provisions and effect of the Executive Orders and Treasury Regulations applicable to the claims in question.

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[6] In its various Statements of Interest in the Iranian cases, the Government has implied that it shares the view that the Algiers Agreement is not self-executing. The Government speaks of the need to "implement" the Algiers Agreement by the Executive Orders and the Treasury Regulations. *See, e.g.*, Statement of Interest of the United States, American International Group v. Islamic Republic of Iran, Nos. 80-1779 and 80-1891, D.C. Cir., filed February 1981, 1 and 8, *as reprinted in* Iranian Assets Litigation Reporter 2530, 2535, 2538 (March 10, 1981).

[7] For example, the Agreement appears to require "termination" of commercial claims in United States courts, but because of the language of Executive Order 12294 the Government has sought, and the courts have ordered, only their "suspension."

It follows that, even if the source of the taking, rather than of the right, were the critical fact under Section 1502, that section could have no preclusive effect here. If the United States took petitioner's (and the hostages') claims, it did so by Executive Order and Treasury Regulations, not by entering into the international agreement which, so far as domestic law is concerned, merely furnished the motivation for the Government in taking action against those with claims against Iran.

CONCLUSION

For the reasons stated, *amicus* respectfully requests the Court to hold, if it reaches those questions, that

(1) the extinguishment of a valid claim against a foreign sovereign, or a prohibition against legal remedies in pursuit of such a claim, may constitute a taking of property for which the Constitution requires the payment of just compensation, and

(2) the Court of Claims has jurisdiction of actions seeking such compensation; 28 U.S.C. § 1502 is no bar to that jurisdiction.

Respectfully submitted,

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No. 80-2078.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

DAMES & MOORE, A PARTNERSHIP,
PETITIONER,
v.
DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES OF AMERICA,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT.

Motion of Chas. T. Main International, Inc. for Leave to File a Brief as Amicus Curiae and Brief of Chas. T. Main International, Inc. as Amicus Curiae.

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Motion for Leave to File a Brief as Amicus Curiae.

Chas. T. Main International, Inc. ("Main") respectfully moves this Court, pursuant to Supreme Court Rule 36.3, for leave to file a brief as amicus curiae in support of the position of the petitioner, Dames & Moore. Main states the following grounds for its motion:

In 1978 and 1979, Main performed engineering services for Iran's Ministry of Energy and two Iranian government instrumentalities. As of November 1, 1979, these entities owed Main approximately $2.88 million. Main sued Iran and its entities in the District of Massachusetts and the Southern District of New York to recover this amount. Main also sued the Central Bank of Iran for its wrongful failure to cash a payment order. In November 1979, Main obtained prejudgment attachments of defendants' property in the Southern District of New York and the District of Massachusetts and a preliminary injunction restraining the defendants from transferring their assets out of the United States. By virtue of its attachments and preliminary injunction, Main enjoyed full security for its claims.

Pursuant to the "Algerian Declarations" at issue here, President Carter purported to nullify Main's attachments and preliminary injunction, to suspend jurisdiction of Main's claims in the federal courts, and to remit Main to an international arbitral tribunal.

In February 1981, Main sued the United States and certain of its officers in the District of Massachusetts to restrain the application of the Algerian Declarations and implementing executive orders and regulations, insofar as they purported to suspend federal court jurisdiction of Main's claims and to interfere with Main's attachments and injunction. On March 27, 1981, the district court dismissed Main's complaint for failure to state a claim. On May 22, 1981, the First Circuit affirmed that order.

While Main's First Circuit appeal was pending, Main participated in the Second Circuit appeal in which the United States sought a determination as to the validity of the Algerian Declarations. On April 9, 1981, the Second Circuit remanded this issue for district court determination.

Before petitioning this Court for a writ of certiorari, Main determined to await the decision of the Southern District of New York, since Main's Iranian claims are secured principally by attachments in that District. (Main's Southern District lawsuit has been placed on the suspense docket.) On June 11, 1981, that court held in a single test case, *Marschalk Company, Inc.* v. *Iran National Airlines Corporation, et al.*, 79 Civ. 7035 (CBM), that the Algerian Declarations, insofar as they purport to suspend federal court jurisdiction and to interfere with the operation of court orders, are beyond the President's powers under federal statute and the United States Constitution.

On June 11, 1981, this Court granted the petition of Dames & Moore for certiorari before judgment. Since the issues Main would raise in a certiorari petition from the First Circuit's order are now before this Court on Dames & Moore's petition, Main believes that it can most effectively assist the Court in determining these important issues by participating as amicus curiae on this appeal. Main has briefed and argued the issues involved in this case in the First and Second Circuits. In these appeals, Main has focussed on the construction and legislative history of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.*; the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* ("IEEPA"); and the Trading with the Enemy Act, 50 U.S.C. App. §§ 1 *et seq.*, from which IEEPA was derived. In briefing these issues in two Circuits, Main has reviewed the legislative history of these three statutes and the sixty-four years of judicial authority construing the Trading with the Enemy Act. Main believes that

no party can adequately duplicate this research, in view of the expedited schedule and the urgency of a prompt decision, and that its participation as amicus curiae is thus of particular importance. Main addresses only these statutory issues in its proposed amicus brief.

Moreover, as a practical matter, the Court's decision in the Dames & Moore case will determine Main's two actions as well, and Main has no other adequate way of protecting its interest except by participating in this appeal.

Finally, Main's business is to provide engineering services to governments and entities located in foreign countries, including a number of developing countries in the Third World. The resolution of the legal issues involved in this case will have ongoing importance to Main in the conduct of its business.

Counsel for Dames & Moore, Bank Markazi Iran and the Solicitor General of the United States have assented to this motion. Counsel for the Islamic Republic of Iran has not assented to this motion.

For the foregoing reasons, Main respectfully requests that this Court grant it leave to file the attached brief as amicus curiae.

Respectfully submitted,

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Dated: June 19, 1981

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DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES OF AMERICA,
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Brief of Chas. T. Main International, Inc. as Amicus Curiae.

Table of Contents.

Interest of the amicus curiae 1

Summary of argument 3

Argument 4

I. The FSIA was intended by Congress to prevent executive interference with court jurisdiction of commercial claims against foreign governments 4

A. The FSIA was intended by Congress to reverse prior executive practice 4

B. The FSIA confers jurisdiction of commercial claims against Iran 7

C. The legislative history of the FSIA demonstrates conclusively that Congress did not intend any "international emergency" exception to the FSIA 8

II. IEEPA does not permit executive interference with United States litigation or court process 14

A. IEEPA's language provides no authority for executive branch interference with court jurisdiction or remedies 15

B. The legislative history of IEEPA indicates clearly that Congress intended no executive interference with court jurisdiction or remedies 17

C. IEEPA does not give the President greater power in peacetime than TWEA gives him in time of war 20

Conclusion 26

Appendices:

Appendix A — Comparison of Pertinent Sections of TWEA and IEEPA 1a

Appendix B — Pertinent Sections of TWEA for Which There Is No Counterpart in IEEPA 2a

Appendix C — Identification of Parent, Subsidiaries and Affiliates of Chas. T. Main International, Inc. Pursuant to Supreme Court Rule 28.1 7a

Table of Authorities Cited.

CASES.

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 16

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) 6, 10

American International Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir. decided May 22, 1981, opinion issued June 5, 1981) 16

Avegno v. Schmidt, 113 U.S. 293 (1885) 22

Becker Steel Co. of America v. Cummings, 296 U.S. 74 (1935) 22, 23

Behring International, Inc. v. Imperial Iranian Air Force, 475 F.Supp. 383 (D.N.J. 1979) 8

Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) 22

Chase Manhattan Bank v. United China Syndicate, Ltd., 180 F.Supp. 848 (S.D.N.Y. 1960) 20

Chas. T. Main International v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir. May 22, 1981) 2, 16

Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) 14, 15

Citizens' Bank of Louisiana v. United States, 87 U.S. (20 Wall.) 114 (1874) 22

Civil Aeronautics Board v. Delta Airlines, Inc., 367 U.S. 316 (1961) 15

Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480 (1947) 19, 23

Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), cert. denied, 436 U.S. 907 (1978) 13

Edye v. Robertson (Head Money Cases), 112 U.S. 580 (1884) 12

Electronic Data Systems Corp., Iran v. Social Security Organization of Iran, 79 Civ. 1711 (S.D.N.Y. May 23, 1979), remanded on other grounds, 610 F.2d 94 (2d Cir. 1979) 8

Electronic Data Systems Corporation Iran v. Social Security Organization of the Government of Iran, 508 F.Supp. 1350 (N.D. Tex. 1981), cert. denied, 49 U.S.L.W. 3912 (June 8, 1981) 16

Ex Parte Republic of Peru, 318 U.S. 578 (1943) 5

Farbenfabriken Bayer A.G. v. Sterling Drug, Inc., 251 F.2d 300 (3d Cir.), cert. denied, 356 U.S. 957 (1958) 20

Guessefeldt v. McGrath, 342 U.S. 308 (1952) 15, 20, 23

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 16

Johnson v. Robison, 415 U.S. 361 (1974) 16

Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A., 343 U.S. 156 (1952) 23

Kuerschner & Rauchwarenfabrik A.G. v. New York Trust Co., 126 F.Supp. 684 (S.D.N.Y. 1954) 20

Lyon v. Singer, 339 U.S. 841 (1950) 20

Marschalk Co., Inc. v. Iran National Airlines Corp., et al., 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981) 7, 9, 11, 13, 14, 16, 18

Miller v. Robertson, 266 U.S. 243 (1924) 21, 25

National Airmotive Corp. v. Iran, 499 F.Supp. 401 (D. D.C. 1980) 16

New England Merchants National Bank v. Iran Power Generation and Transmission Co., et al., Nos. 1049-1144 (2d Cir. April 9, 1981) 2

New England Merchants National Bank v. Iran Power Generation and Transmission Co., et al., 502 F. Supp. 120 (S.D.N.Y. 1980), remanded, Nos. 1049-1144 (2d Cir. April 9, 1981) 5

Orvis v. Brownell, 345 U.S. 183 (1953) 20

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 16

Posadas v. National City Bank of New York, 296 U.S. 497 (1936) 17

Propper v. Clark, 337 U.S. 472 (1949) 20

Reading & Bates Drilling Co. v. National Iranian Oil Co., 79 Civ. 6034 (S.D.N.Y. Nov. 29, 1979) 8

Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) 5

Rich v. Naviera Vacuba, S.A., 197 F.Supp. 710 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961) 5, 6, 10, 16

Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) 5

Shields v. Schiff, 124 U.S. 351 (1888) 22

Silesian-American Corp. v. Clark, 332 U.S. 469 (1947) 20, 22

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 16, 17

Stoehr v. Wallace, 255 U.S. 239 (1921) 22

Texas Trading & Milling Corp. v. Federal Republic of Nigeria, No. 644 (2d Cir. April 16, 1981) 9

Turner v. American Baptist Missionary Union, 24 Fed. Cas. 344 (No. 14,251) (C.C. Mich. 1852) 13

United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975) 14

Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965) 6

Watts, Watts & Co. v. Unione Austriaca di Navigazione, 248 U.S. 9 (1918) 22

White v. Mechanics Securities Corp., 269 U.S. 283 (1925) 5, 15, 16

Whitney v. Robertson, 124 U.S. 190 (1888) 12

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 24, 25

Zittman v. McGrath, 341 U.S. 446 (1951) 20

STATUTES, TREATIES, EXECUTIVE ORDERS, REGULATIONS AND RULES.

22 U.S.C. § 2370(e)(2) 10

Foreign Sovereign Immunities Act (codified at 28 U.S.C. §§ 1330, 1602 et seq.) 3, 4, passim

§ 1330 7

§ 1602 7

§ 1603(a)-(b) 7

§ 1605(a)(2) 7

§ 1606 7

§ 1610(d) 7

50 U.S.C. § 191 16

International Emergency Economic Powers Act (codified at 50 U.S.C. §§ 1701 et seq.) 3, 14, passim

§ 1702(a)(1)(B) 14, 15, 20, 23, 24

§ 1706(a) 18

Trading with the Enemy Act (codified at 50 U.S.C. App. §§ 1 et seq.) 15, passim

§ 5(b) 18, 20, 22, 23, 24

§ 7(c) 21, 24

§ 9 21, 22, 24
§ 9(a) 23
40 Stat. 415 21
40 Stat. 419-20 21, 22
40 Stat. 1020 21
55 Stat. 839-40 22
Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, 8 U.S.T. 899 (entered into force June 16, 1957) 6, 7

LEGISLATIVE MATERIALS.

S. 566, 93d Cong. 1st Sess. (1973) 14
H.R. 3493, 93d Cong. 1st Sess. (1973) 14
H.R. Rep. No. 85, 65th Cong. 1st Sess. (1917) 21
H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. (1976) 4, 6, 8, 10, 11, 13, 14
H.R. Rep. No. 95-459, 95th Cong. 1st Sess. (1977) 16, 17, 18, 19
Hearings before House Subcommittee on International Economic Policy of Committee on International Relations on H.R. 1560 and H.R. 2382, 95th Cong. 1st Sess. (1977) 18, 23
Hearings on H.R. 3493 before House Committee on the Judiciary, Subcommittee on Claims and Government Relations, 93d Cong. 1st Sess. (June 7, 1973) 14
Hearings on H.R. 11315 before House Committee on Judiciary, Subcommittee on Administrative Law and Government Relations, 94th Cong. 2d Sess. (June 2 and 4, 1976) 8, 10, 11, 12, 13

Revision of Trading with the Enemy Act, Markup before the Committee on International Relations, House of Representatives, 95th Cong. 1st Sess. (1977) 17, 19
S. Rep. No. 911, 77th Cong. 1st Sess. (1941) 19, 23
S. Rep. No. 94-1310, 94th Cong. 2d Sess. (1976) 4
S. Rep. No. 95-466, 95th Cong. 1st Sess. (1977) 17, 18, 19
87 Cong. Rec. 9838 (Dec. 16, 1941) 23
87 Cong. Rec. 9861 (Dec. 16, 1941) 22
87 Cong. Rec. 9862 (Dec. 16, 1941) 23
87 Cong. Rec. 9863 (Dec. 16, 1941) 23
87 Cong. Rec. 9865 (Dec. 16, 1941) 23
87 Cong. Rec. 9866 (Dec. 16, 1941) 23
108 Cong. Rec. 22461 (Oct. 5, 1962) 6
122 Cong. Rec. 33532 (Sept. 29, 1976) 8
123 Cong. Rec. 22475-76 (July 12, 1977) 17, 19

MISCELLANEOUS.

Frankfurter, Some Reflections on the Reading of Statutes, 47 Columbia L. Review 527 (1947) 15
Leigh & Atkinson, "Due Process in The Emerging Foreign Relations Laws of the United States, Part I," 21 Bus. Lawyer 853 (July 1966) 5
Leigh & Atkinson, "Due Process In The Emerging Foreign Relations Laws of the United States, Part II," 22 Bus. Lawyer 3 (Nov. 1966) 6
Lowenfeld, "Claims Against Foreign States — A Proposal for Reform of United States Law," 44 N.Y. U.L. Rev. 901 (1969) 6

Note, 15 Harvard International Law Journal 157 (1974) 10

President Carter's Message to Congress, 15 Weekly Comp. of Pres. Docs. 3041 (Jan. 19, 1981) 19

Restatement of the Foreign Relations Law of the United States (Revised) (Tent. Draft No. 1, Apr. 1, 1980) 17

Statement by the President on Signing H.R. 11315 into Law, 12 Weekly Comp. of Pres. Docs. 1554 (Oct. 22, 1976) 9

"Tate Letter," Letter from Jack B. Tate to Philip B. Perlman, May 19, 1952, 26 Dept. State Bull. 984 (1952) 5

Interest of the Amicus Curiae.

Chas. T. Main International, Inc. ("Main") is a consulting engineering firm located in Boston, Massachusetts. In 1978 and 1979, Main performed engineering services for Iran's Ministry of Energy and two Iranian government instrumentalities, Khuzestan Water & Power Authority and Mahab Consulting Engineers. Main performed its work in Boston and Iran, with the assistance of Iranian government employees in both locations. As of November 1, 1979, these entities owed Main a total of $2,878,787. In early November, at Iran's request, Main's senior project engineer went to Tehran to obtain payment. The seizure of the American Embassy compelled his hasty departure.

Unable to obtain payment of this substantial outstanding receivable by negotiation, Main in November 1979 sued Iran and its two instrumentalities in the federal district courts in Massachusetts and New York.[1] In its Massachusetts action, Main obtained a preliminary injunction restraining the Iranian government defendants from transferring their assets located in the United States. Main also obtained attachments on trustee process, which were returned "no funds." In its New York action, Main obtained *ex parte* attachments of assets belonging to the Iranian government defendants at the Federal Reserve Bank of New York and certain New York commercial banks. The United States has stipulated that Main had attached sufficient assets to provide full security for its claims.

On January 20, 1981, President Carter, in the "Algerian Declarations," purported to nullify Main's attachments and preliminary injunction, to suspend jurisdiction of Main's claims in the federal courts, and to remit Main to an international arbitral tribunal which was to have been established by May 19, 1981. The arbitral tribunal is to pay claims out of a one billion dollar security fund — adequate, according to figures supplied by the United States in Main's lawsuit described

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[1] Main also sued the Central Bank of Iran for its failure to cash a $378,000 payment order which Mahab Consulting Engineers had issued to Main shortly before the seizure of the embassy.

below, to pay outstanding claims at twenty cents on the dollar — together with a promise by Iran to pay the remaining balance of the claims. Main, which has never authorized the United States Government to settle its claims against Iran, commenced a declaratory judgment proceeding against the United States and its appropriate officers in February 1981. Main sought a declaration that the executive agreement was in excess of statutory authority and was unconstitutional or, alternatively, that the executive agreement took Main's property for public use without just compensation. On March 17, 1981, the District Court dismissed this complaint. On May 22, 1981, the First Circuit affirmed that order. *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981).

While Main's First Circuit appeal was pending, the United States sought to intervene in the Second Circuit appeal on the determination of "common issues" by Judge Duffy in the Southern District of New York. Main briefed and argued the substantive issues on that appeal, although arguing that remand was the most appropriate course. On April 9, 1981, the Second Circuit issued an order of remand directing Judge Duffy to select a single test case in which to determine the issue of the validity of the Algerian Declarations. *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co., et al.*, Nos. 1049-1144 (2d Cir. April 9, 1981). Following the remand, Main's Southern District action was placed by Judge Duffy on the suspense docket, pending a ruling on the validity of the Algerian Declarations by this Court. Therefore, as a practical matter, the decision by this Court in this case will finally determine Main's actions as well.[2]

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[2] Main has not yet filed a petition for certiorari from the First Circuit's decision. Main had determined to await the decision of Judge Duffy before petitioning. Judge Duffy's opinion holding the Algerian Declarations to be beyond the President's statutory and constitutional powers was issued on June 11, 1981, the same day this Court granted certiorari in this case. Now that the issues are before the Court in this case, Main believes it can most effectively assist the Court by participating on this appeal as amicus curiae.

Moreover, Main provides services to governments and entities located in foreign countries, including a number of developing countries in the Third World. The resolution of the legal issues in this case is of ongoing business interest to Main.

Summary of Argument.

In enacting the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602 *et seq.*, Congress intended to reverse the prior executive practice of terminating lawsuits of private American claimants against foreign states for political or diplomatic reasons. In the Act, Congress provided predictable and certain access to United States courts for United States citizens doing business with foreign states, without executive interference, whether by suggestion of immunity or by executive agreement, as here. Congress deliberately chose to deny to the President whatever purported "flexibility" in international crises may be derived from executive control of such actions. Now to allow the executive branch to suspend the claims of United States citizens against Iran in United States courts eviscerates this congressional intent and permits rejected notions of sovereign immunity to reenter the federal courts through the back door.

The International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, *et seq.* ("IEEPA") does not authorize executive interference with federal court jurisdiction and orders. IEEPA, derived from the Trading with the Enemy Act, was intended to restrict the President's emergency powers in peacetime. Under the wartime statute, the President could not interfere with court proceedings, "nullify" federal court orders, nor confiscate the interests of United States citizens in alien property without just compensation. Respondents' construction of IEEPA to give the President more power in peacetime than he could exercise in war is inconsistent with plainly expressed legislative intent.

Argument.

I. The FSIA was Intended by Congress to Prevent Executive Interference with Court Jurisdiction of Commercial Claims Against Foreign Governments.

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.* ("FSIA"), enacted in 1976, is broad remedial legislation intended by Congress to eliminate executive branch interference in litigation brought by United States citizens against foreign governments for commercial claims. The purpose of the FSIA is two-fold: "[T]o provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6 (1976) ("FSIA House Report").[3]

The argument of the United States and the holdings of the First and District of Columbia Circuits rest on the proposition that Congress' secondary purpose in enacting the FSIA — "to provide when a foreign state is entitled to sovereign immunity" — is the sole purpose of the Act, and that the FSIA does not address the issue of "when and how parties can maintain a lawsuit against a foreign state . . . in the courts of the United States. . . ." This interpretation of the statute is at odds with its clearly expressed legislative purpose.

A. *The FSIA Was Intended by Congress to Reverse Prior Executive Practice.*

Prior to the enactment of the FSIA, actions by United States citizens against foreign states were cognizable in United States

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[3]The FSIA House Report is identical to the Senate report, S. Rep. No. 94-1310, 94th Cong., 2d Sess. (1976), except for pagination. All citations herein will be made to the FSIA House Report.

courts. However, such actions would be terminated upon the State Department's filing a suggestion of immunity, to which the court would normally "defer." *See, e.g., Rich* v. *Naviera Vacuba, S.A.*, 197 F.Supp. 710 (E.D. Va.), *aff'd.*, 295 F.2d 24 (4th Cir. 1961).

Under pre-FSIA practice, a foreign state that did not wish to be sued in the United States would request the State Department to file a suggestion of immunity. The State Department would decide such requests on the basis of political considerations, often without regard to any rule of law. *See generally*, Leigh & Atkinson, *Due Process In The Emerging Foreign Relations Law Of The United States, Part I*, 21 Bus. Lawyer 853 (July 1966). After the lawsuit was terminated, the citizen's claim would, at the State Department's discretion, be "adjusted through diplomatic channels." *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945); *Ex Parte Republic of Peru*, 318 U.S. 578, 588-89 (1943) (under this immunity practice, "the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsion of judicial proceeding").[4] Even after expounding the "restrictive theory" of sovereign immunity in the Tate Letter, Letter from Jack B. Tate to Philip B. Perlman, May 19, 1952, 26 Dept. of State Bull. 984 (1952), the State Department frequently departed

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[4] Before the enactment of the FSIA, the defense of sovereign immunity was unavailable to unfriendly sovereign states. *E.g., White* v. *Mechanics Securities Corp.*, 269 U.S. 283 (1925); *Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *cf., New England Merchants National Bank* v. *Iran Power Generation and Transmission Co., et al.*, 502 F.Supp. 120, 124 (S.D.N.Y. 1980), *remanded*, Nos. 1049-1144 (2d Cir. April 9, 1981). Under respondents' interpretation of the FSIA, unfriendly states that are willing to defy international standards of conduct will be able to escape suit in United States courts, while friendly states unwilling to provoke an international emergency can be sued here for commercial acts. This is a result which Congress in enacting the FSIA plainly did not intend.

from its articulated policy by filing suggestions of immunity when it was politically expedient to do so.[5]

A version of the FSIA was first proposed in 1973 in response to academic, business and congressional pressure for a certain, non-discretionary United States remedy for citizens doing business with foreign states.[6] In enacting the FSIA in 1976, Congress recognized that the absolute theory of sovereign immunity, with diplomatic claims settlement practices and subordination of individual rights to foreign policy goals, was incompatible with modern international trade. *See, e.g.*, FSIA House Report, *supra*, at 6-7.[7] Congress consciously

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[5] The restrictive theory provides that a foreign state is not entitled to claim sovereign immunity for its "commercial acts" — acts which a private person could perform. *See, Victory Transport, Inc.* v. *Comisaria General*, 336 F.2d 354, 358 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). This concept is also embodied in a series of friendship, commerce and navigation treaties. Thus, the Treaty of Amity between the United States and Iran, 8 U.S.T. 899, Art. XI(4), provides that if Iran or its entities engaged in certain business activities in the United States, they would be subject to suit and other liabilities here as if they were private persons.

[6] In reaction to an agreement with Cuba in which a suggestion of immunity was filed in exchange for Cuba's release of a hijacked United States airliner, *Rich* v. *Naviera Vacuba, S.A.*, *supra*, Senator Ervin proposed a bill to provide explicit federal court jurisdiction of such cases. He urged: "[L]et us . . . give [American] citizens a maximum chance to protect themselves in their own country through our own laws and our own lawyers." 108 Cong. Rec. 22461 (Oct. 5, 1962). The campaign was taken up by Monroe Leigh and Timothy Atkinson, Leigh & Atkinson, *Due Process In The Emerging Foreign Relations Law of the United States. Part II*, 22 Bus. Lawyer 3, 17-19, 27 (Nov. 1966); *see also*, Lowenfeld, *Claims Against Foreign States — A Proposal for Reform of United States Law*, 44 N.Y.U.L.Rev. 901 (1969).

[7] These principles were vigorously expressed in the pre-FSIA case of *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 703-04 (1976) ("Participation by foreign sovereigns in the international commercial market has increased substantially in recent years. . . . The potential injury to private businessmen — and ultimately to international trade itself — from a system in which some of the participants in the international market are not subject to the rule of law has therefore increased correspondingly").

determined to eliminate the diplomatic advantages of using private claims as a "bargaining chip" in political crises, in order to further the other important national objective of fostering international trade. (*See*, *infra*, at 9-11). Congress thus provided jurisdiction of actions against foreign states and eliminated executive branch interference with such litigation, whether by suggestion of immunity or by executive agreement and orders of broad applicability, as here.

B. *The FSIA Confers Jurisdiction of Commercial Claims Against Iran.*

The FSIA provides United States court jurisdiction of civil actions against foreign states[8] that are not entitled to claim sovereign immunity. 28 U.S.C. § 1330. Congress provided in the Act that immunity determinations were to be made exclusively by the courts, using the legal standards set out in the statute and under circumstances that guarantee due process. 28 U.S.C. § 1602.

Under the FSIA, a federal or state court has jurisdiction of a commercial claim against a foreign state where the claim has specified minimum jurisdictional contacts with the United States. 28 U.S.C. §§ 1330, 1605(a)(2). A foreign state subject to United States jurisdiction "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Pre-judgment attachment of property of a foreign state is available under the FSIA if the state has explicitly waived immunity from pre-judgment attachment. 28 U.S.C. § 1610(d).[9]

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[8] The term "foreign state" is defined in 28 U.S.C. §§ 1603(a)-(b) to include the state, its entities and state-controlled corporations.

[9] Iran also waived immunity from suit and pre-judgment attachment in the Treaty of Amity, Art. XI, ¶4. *See, e.g., Marschalk Company, Inc.* v.

C. *The Legislative History of the FSIA Demonstrates Conclusively that Congress Did Not Intend Any "International Emergency" Exception to the FSIA.*

The legislative history of the FSIA provides a clear record of Congress' decision to eliminate all executive branch interference with commercial litigation by United States citizens against foreign states, by suggestion of immunity or by executive agreement. The FSIA was intended to "inform parties when they can have recourse to the courts to assert a legal claim against a foreign state." FSIA House Report, *supra*, at 7. This purpose, repeatedly emphasized in the Committee Reports on the FSIA, *see*, *id.* at 6, 8, 9, 12,[10] was articulated by President Ford on signing the FSIA into law:

Iran National Airlines Corporation, et al., 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981); *Electronic Data Systems Corp. Iran* v. *Social Security Organization of Iran*, 79 Civ. 1711 (S.D.N.Y. May 23, 1979), *remanded on other grounds*, 610 F.2d 94 (2d Cir. 1979); *Reading & Bates Drilling Co.* v. *National Iranian Oil Co.*, 79 Civ. 6034 (S.D.N.Y. Nov. 29, 1979); *Behring International, Inc.* v. *Imperial Iranian Air Force*, 475 F.Supp. 383, 390 (D.N.J. 1979).

[10] *See also*, 122 Cong. Rec. 33532 (Sept. 29, 1976) (Rep. Danielson); Hearings on H.R. 11315 before House Comm. on Judiciary, Subcomm. on Admin. Law and Govt. Rels., 94th Cong. 2d Sess. (June 2 and 4, 1976) ("FSIA House Hearings"), at 24-25, 27, 29 (Monroe Leigh, Legal Adviser State Dept.); 30, 31 (Bruno Ristau, Justice Dept.) (executive branch intercession "has caused foreign relations problems for the executive branch," and the bill would "depoliticize the area"); Joint Letter from Depts. of State and Justice to Speaker of the House, *reprinted in* FSIA House Report, *supra*, at 44-45 (endorsing effort to "facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation" by committing these issues exclusively to the judiciary). As Monroe Leigh stated: "[W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreement which it may breach. . . . The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties." FSIA House Hearings, *supra*, at 27.

> "This legislation will enable American citizens and foreign governments alike to ascertain when a foreign state can be sued in our courts. In this modern world where private citizens increasingly come into contact with foreign government activities, it is important to know when the courts are available to redress legal grievances." Statement by the President on Signing H.R. 11315 Into Law, 12 Weekly Comp. of Pres. Docs. 1554 (October 22, 1976).

See, Texas Trading & Milling Corp. v. *Federal Republic of Nigeria*, No. 644 (2d Cir. April 16, 1981), Slip Op. at 2588, 2597, 2602, 2608-09 (Congress enacted the FSIA "specifically" to provide "access to the courts to those aggrieved by the commercial acts of a foreign sovereign," reasoning that the underlying goal of the FSIA was to ensure that all participants in the marketplace are treated equally). As the Second Circuit stated, "'If a government department goes into the market places of the world and buys boots or cement — as a commercial transaction — that government department should be subject to all the rules of the marketplace,'" *id.* at 2597 (citation omitted); *see*, *id.* at 2609 ("Our rulings today . . . affirm the right of all participants in the marketplace of the world to be treated as equals. . . ."); *see*, *Marschalk Company*, *supra*, Slip Op. at 28 (FSIA eliminates "all executive branch interference with the jurisdiction of the United States courts of commercial claims of United States citizens against foreign defendants").

The FSIA restricts executive branch flexibility in an international crisis. This was the result of a deliberate congressional choice. Congress considered and rejected the notion of executive control of commercial claims, although permitting continuing executive control of expropriation claims under

22 U.S.C. § 2370(e)(2). FSIA House Report, *supra*, at 20 & n.1, citing *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, *supra*.

At the House Hearings, Monroe Leigh, Legal Adviser to the State Department, asked Congress to weigh the "advantage to the State Department to be able to intervene by expressing essentially a political judgment in an act of state [sic] case pending in the courts" against the "substantial disadvantages" of this practice. FSIA House Hearings, *supra*, at 34. Mr. Leigh emphasized the "substantial disadvantages" of the existing "system in which some government is putting strong pressure on the Department of State to decide a lawsuit — we would much rather see it handled by the courts." *Id.* He added:

> "[T]he State Department, being a political institution, has not always been able to resist these pressures. And to my way of thinking, this consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see established." *Id.* at 35.

Michael Cardozo, a proponent of executive branch power to interfere with court proceedings, argued in the House Hearings that such power was needed to give the President "flexibility" in international affairs. He cited as an example of this need the State Department's deal with Cuba in which the State Department traded a suggestion of immunity for a hijacked United States airliner. *Id.* at 61-65; *see*, *Rich* v. *Naviera Vacuba, S.A.*, *supra*.[11]

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[11] As one writer noted in discussing the 1973 predecessor bill to the FSIA and *Rich* v. *Naviera Vacuba, S.A.*, *supra*, "[I]f immunity is used as a political bargaining chip, it may be granted most often to sovereigns in relation to whom the interests of the United States are in jeopardy, with the result that enemies gain more from its use than allies." Note, 15 Harv. Int. Law J. 157, 170 (1974).

Congress, with both arguments before it, rejected Mr. Cardozo's view. It struck the balance by giving up the occasional foreign policy advantage of being able to barter with a foreign government in hijackings, hostage takings and other rare events in exchange for the advantages of promoting international trade, providing predictability for litigants and eliminating political pressure on the State Department. The FSIA thus provides for court jurisdiction that cannot be traded away by the executive.

Congress eliminated executive interference through suggestions of immunity and executive agreements. The bill as originally proposed by the State and Justice Departments provided that the FSIA would be "[s]ubject to existing *and future international agreements*." H.R. 11315, § 1604 (emphasis added). The reference to "future international agreements" was deleted in committee, because "it was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement" that might interfere with court jurisdiction. FSIA House Report, *supra*, at 10; *Marschalk Company*, *supra*, Slip Op. at 29. Discussions in the FSIA House Hearings further confirm the intent to prohibit executive interference with court jurisdiction:

> "[Rep.] MOORHEAD. . . . But those clauses also refer to future agreements which would totally potentially change the operation of these suits [against foreign states]. And isn't Congress giving an awful lot of discretion to the State Department in referring to any future agreement as being authorized to change the basic substance of the law?
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> "Mr. LEIGH: Well, I think on that, Mr. Moorhead, that anything of significance which the Executive tried to do in this area, it would have to do by coming back to Congress, either by treaty or by some form of legislation which would give Congress an opportunity to decide.

"Mr. MOORHEAD: A treaty doesn't go back to the House of Representatives, though.

"Mr. LEIGH: I make that statement, however, in the knowledge of the kinds of things that would have to be done here. I don't believe a treaty would be self-executing, but would require some form of implementing legislation which would involve the House of Representatives." FSIA House Hearings, *supra*, at 52.[12]

Later, Representative Moorhead stated in a colloquy with Mr. Olmstead, a private attorney:

"Mr. MOORHEAD: There is some wording in some of this legislation that I have been a little bit concerned about. . . . The bill states that the immunity of foreign states recognized by this bill is subject to existing and future international agreements.

"Is not this not [sic] a delegation of tremendous authority by the Congress to the executive or whoever might be entering into these international agreements?"

Mr. Olmstead responded that "it would take an act of Congress to implement [any change in the FSIA] because it does involve the judiciary [over] which the Congress has sole constitutional authority." *Id.* at 86-87.

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[12] Under well-established law, an executive agreement (or treaty) will not be self-executing if the agreement impinges on an area within the exclusive control of both houses of Congress. *See, e.g., Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888); *Edye* v. *Robertson* (Head Money Cases), 112 U.S. 580, 598-99 (1884). The Algerian Declarations require for their implementation legislation within two areas of Congress' exclusive control. First, the Declarations purport to nullify claims pending in federal courts and to deny

In reporting the FSIA, the committees chose to delete the reference to "future international agreements" rather than leave open any possible "discretion to the State Department . . . to change the basic substance of the law." *Id.* at 52. Congress thereby eliminated any residual executive power to vary the terms of the FSIA by international executive agreement, such as the executive has attempted to do here.

The First Circuit's reasoning that the President has not here interfered with federal court jurisdiction, but has merely "settled" Main's underlying claim, eviscerates Congress' principal intent in enacting the FSIA to "provide when and how parties can maintain a lawsuit against a foreign state . . . in the courts of the United States. . . ." FSIA House Report, *supra*, at 6. As the Solicitor General argued as amicus curiae in *Dunhill*:

> "[U]nder the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate a foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine." Amicus Brief of United States at 41, cited in FSIA House Report, *supra*, at 20, n.1.

The "niceties of language" should not obscure the real effect of the Algerian Declarations. *Marschalk Company*, *supra*,

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federal court jurisdiction over such claims, an area within Congress' exclusive power. Second, Art. VI of the Declarations provides that the expenses of the Tribunal are to be borne equally by the United States and Iran. However, only Congress can exercise the appropriations power; an executive agreement is not self-executing if it requires the appropriation of federal funds. *E.g.*, *Edwards* v. *Carter*, 580 F.2d 1055, 1058 (D.C. Cir.) (per curiam), *cert. denied*, 436 U.S. 907 (1978) (treaty); *Turner* v. *American Baptist Missionary Union*, 24 Fed. Cas. 344 (No. 14, 251) (C.C. Mich. 1852).

Slip Op. at 32. This purported "claims settlement" does not "settle" Main's claims, nor does it provide relief previously unavailable because of sovereign immunity. *Id.* at 45-46. Rather, in the face of a congressional statute to the contrary, it allows Iran to avoid the jurisdiction of United States courts under the FSIA.[13] It permits sovereign immunity to reenter through the back door under the guise of claims settlement doctrine. In the Solicitor General's own view, this cannot be permitted.

II. IEEPA Does Not Permit Executive Interference with United States Litigation or Court Process.

The International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* ("IEEPA"), does not authorize executive branch interference in domestic litigation, even in an national emergency. The First and District of Columbia Circuits, in holding to the contrary, have woodenly applied the language of 50 U.S.C. § 1702(a)(1)(B), without regard to the congressional purpose and history of that provision.[14]

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[13] The single reference to claims settlement practice in the legislative history of the FSIA suggests that Congress viewed the claims settlement power as an "option" which could be used by a claimant against a foreign government where, for example, the claimant had obtained an FSIA-authorized judgment but was unable to obtain execution of judgment in the United States. Hearings before the Subcomm. on Claims and Govt. Rels., Comm. on Jud., on H.R. 3493, 93d Cong. 1st Sess. 23-26 (1973). However, the FSIA House Report advises caution in utilizing the 1973 legislative history to construe the 1976 Act, FSIA House Report, *supra*, at 12, and the foreign sovereign immunities bills proposed in 1973, S. 566 and H.R. 3493, 93d Cong. 1st Sess., differed in significant respects from the FSIA as enacted.

[14] This Court has long spoken out against the literal application of statutory language. *United Housing Foundation Inc.* v. *Forman*, 421 U.S. 837, 849 (1975); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457,

A. *IEEPA's Language Provides No Authority for Executive Branch Interference with Court Jurisdiction or Remedies.*

A literal reading of 50 U.S.C. § 1702(a)(1)(B), granting the President power in an international emergency to "investigate, regulate, direct and compel, nullify, void, prevent or prohibit" the acquisition or exercise of "any right, power or privilege" by any person within the jurisdiction of the United States with respect to any property in which a foreign country or national has an interest, would permit the President virtually unlimited powers in a national emergency. IEEPA was part of the 1977 "Trading with the Enemy Act Reform Legislation" and was intended by Congress to limit the scope of presidential power in peacetime. Under the Trading with the Enemy Act, 50 U.S.C. App. §§ 1 *et seq.* ("TWEA"), in times of war, the President was not permitted to "intermeddle" with private litigation in the absence of express congressional authorization to do so. *White* v. *Mechanics Securities Corp.*, 269 U.S. at 301. The President here seeks more power in peacetime than he was able to exercise under TWEA in time of war. Such a construction of IEEPA is inconsistent with the legislative intent.

IEEPA, § 1702(a)(1)(B) does not justify executive branch interference with United States litigation. It grants the Presi-

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459 (1892) ("[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers"); *Civil Aeronautics Board* v. *Delta Airlines, Inc.*, 367 U.S. 316, 328 (1961) ("[Literalism] 'has all the tenacity of original sin and must constantly be guarded against'"). *See*, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). With respect to the predecessor statute to IEEPA, the Trading with the Enemy Act, Justice Frankfurter cautioned that the statute was a "makeshift patchwork" enacted to deal with complex and far-reaching wartime problems; hence, "such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes." *Guessefeldt* v. *McGrath*, 342 U.S. 308, 319 (1952).

dent only economic powers with respect to the property of foreign countries or their nationals, in international emergencies. *See*, H.R. Rep. No. 95-459, 95th Cong. 1st Sess. 10-11 (1977) ("IEEPA House Report"). It does not provide an exception to the FSIA's *in personam* jurisdiction and remedies against foreign states.

IEEPA cannot be read implicitly to alter federal court jurisdiction and remedies: a statute restricting the jurisdiction of or remedies available in a federal court must be clear and unequivocal. *See*, *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967); *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330 (1944); *Rich* v. *Naviera Vacuba, S.A.*, 197 F.Supp. at 717-18 (national emergency legislation, 50 U.S.C. § 191, did not empower the Coast Guard to interfere with federal court process in the absence of a "statute expressly authorizing" such interference). IEEPA has repeatedly been construed to provide no exception to FSIA jurisdiction or remedies. *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority*, No. 80-1027 Slip Op. at 13-14a & n.13 (1st Cir. May 22, 1981) (jurisdiction); *American International Group, Inc.* v. *Islamic Republic of Iran*, No. 80-1779 Slip Op. at 27 n.15 (D.C. Cir. decided May 22, 1981, opinion issued June 5, 1981) (jurisdiction); *Marschalk Company*, *supra*, Slip Op. at 30; *Electronic Data Systems Corp. Iran* v. *Social Security Organization of the Government of Iran*, 508 F.Supp. 1350, 1364 (N.D. Tex. 1981), *cert. denied*, 49 U.S.L.W. 3912 (June 8, 1981); *National Airmotive Corp.* v. *Iran*, 499 F.Supp. 401, 404-05 (D.D.C. 1980); *cf.*, *White* v. *Mechanics Securities Corp.*, 269 U.S. at 301 (construing TWEA).[15]

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[15] Repeals by implication are not favored, and an intent to repeal by implication must be "clear and manifest." *E.g.*, *Silver* v. *New York Stock*

B. *The Legislative History of IEEPA Indicates Clearly that Congress Intended No Executive Interference with Court Jurisdiction or Remedies.*

TWEA authorized the President to take certain extraordinary measures to deal with international crises in times of peace and war. In enacting IEEPA in 1977, Congress limited TWEA's broad grant of authority to times of declared war. IEEPA House Report, *supra*, at 2, 7, 10. Criticizing TWEA as having "become essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena," Congress in IEEPA created a "new set of international economic powers, more restricted than those available during time of war. . .." *Id.* at 10. *See also*, Revision of Trading With the Enemy Act, Markup Before the Committee on International Relations, 95th Cong. 1st Sess. 5 (1977) ("House Markup") (under TWEA, the President exercised almost "dictatorial" powers in peacetime; IEEPA restricted this power substantially).

In IEEPA, Congress limited the President's authority to transactions which are "international" and "economic" in nature. *See*, 123 Cong. Rec. 22475 (July 12, 1977) (Rep. Bingham). The IEEPA House Report states: "As a further substantive constraint, the scope of the authorities should be clearly limited to the regulation of international economic transactions." *Id.* at 10-11. *See*, S. Rep. No. 95-466, 95th

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Exchange, 373 U.S. 341, 357 (1963); *Posadas* v. *National City Bank of New York*, 269 U.S. 497, 503 (1936). *See also*, Restatement of the Foreign Relations Law of the United States (Revised) 66, § 135 comment a (Tent. Draft No. 1, Apr. 1, 1980) ("authorization to make agreements superseding federal law should not be inferred lightly . . .").

Cong. 1st Sess. 2 (1977) ("IEEPA Senate Report").[16] IEEPA was not intended to permit executive control of "noneconomic aspects of international intercourse." IEEPA House Report, *supra*, at 11. An executive order nullifying attachments and suspending jurisdiction is not regulation of international economic transactions; it is direct interference with the judicial process. *Marschalk Company*, *supra*, Slip Op. at 29.

IEEPA's legislative history contains no intimation that the statute was intended to affect FSIA jurisdiction and pre-judgment security rights. Rather, IEEPA was intended to augment judicial remedies by providing, by means of IEEPA's freezing power, additional security for claimants. *See*, 50 U.S.C. § 1706(a); *Marschalk Company*, *supra*, Slip Op. at 25; IEEPA House Report, *supra*, at 17; IEEPA Senate Report, *supra*, at 6. Congress intended that private litigation against frozen assets, including the claimants' ability to "impound properties or accounts," would continue unimpeded. IEEPA House Hearings, *supra*, at 217-18 (interchange between Rep. Findley and Mr. Majak, staff counsel).

Congress did not provide in IEEPA any counterpart to TWEA's wartime power to seize and vest enemy assets — the very powers the Government seeks to exercise here. Thus, § 5(b) of TWEA, 50 U.S.C. App. § 5(b) delegates to the President the power to vest and the power to "hold, use [or]

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[16] As examples of "international economic transactions," Congress referred to "foreign exchange transactions, transfers of credit or payments between banking institutions," "importing or exporting of currency or securities," and "regulat[ing] or freez[ing] any property in which any foreign country or a national thereof has any interest." IEEPA Senate Report, *supra*, at 5; *see*, IEEPA House Report, *supra*, at 15; 123 Cong. Rec. 22476 (July 12, 1977); House Markup, *supra*, at 8 (Rep. Bingham); Hearings before House Subcommittee on International Economic Policy of the Committee on International Relations, House of Representatives, on H.R. 1560 and H.R. 2382, 95th Cong. 1st Sess. 163 (1977) ("IEEPA House Hearings") (interchange between Rep. Bingham and Mr. Majak, staff counsel).

otherwise deal with [alien property] in the interest of and for the benefit of the United States." TWEA was amended in 1977 "to remove the authority of the President to use [those] authorities [in international crises] other than a declared war." IEEPA House Report, *supra*, at 2. *See also*, 123 Cong. Rec. 22475 (July 12, 1977) (Rep. Bingham); House Markup, *supra*, at 4 (Rep. Bingham).[17] The wartime presidential powers thus withheld in IEEPA included the power "'to affirmatively compel the use and application of foreign property in a manner consistent with the interests of the United States.' Sen. Rep. No. 911, 77th Cong 1st Sess p. 2." *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 487 (1947) (citing legislative history of TWEA) (footnote omitted).

The orders and regulations at issue here do more than "freeze," "regulate" or "block" Iranian interests in property. They suspend court jurisdiction, nullify court orders and affirmatively direct the transfer of blocked Iranian assets out of the United States, for the benefit of the United States. *See*, President Carter's Message to Congress, 17 Weekly Comp. of Pres. Docs. 3041, 3042 (January 19, 1981). This effects a seizure of Main's interests in that property and a deprivation of Main's rights beyond that permitted even in wartime. As such, it is prohibited by IEEPA.

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[17] *See*, IEEPA Senate Report, *supra*, at 5 ("Section 203(a) would grant the President emergency authority to regulate foreign exchange transactions, transfers of credit or payments between banking institutions where a foreign interest is involved, import or export of currencies or securities, and to control or freeze property transactions where a foreign interest is involved. . . . Authority to vest property . . . and regulate purely domestic economic transactions would not be granted"); 123 Cong. Rec. 22475, 22476 (July 12, 1977) (Rep. Bingham); House Markup, *supra*, at 3 (Rep. Bingham) (no power to "seize property"), 4 (Rep. Bingham) ("freeze but not seize"), 18 (Rep. Solarz), 20 (Mr. Bergsten), 38 (Rep. Bingham) ("the power to freeze assets" given in IEEPA; the "power to seize property" is limited to exercise in wartime).

TWEA § 5(b) did not bar a United States citizen, even without a Treasury Department license, from bringing a lawsuit against an enemy alien to recover a debt or from obtaining an attachment that created rights effective against the alien debtor. *Zittman* v. *McGrath*, 341 U.S. 446 (1951); *Propper* v. *Clark*, 337 U.S. 472 (1949); *Lyon* v. *Singer*, 339 U.S. 841 (1950); *Farbenfabriken Bayer A.G.* v. *Sterling Drug, Inc.*, 251 F.2d 300, 303-05 (3d Cir.), *cert. denied*, 356 U.S. 957 (1958); *Kuerschner & Rauchwarenfabrik A.G.* v. *New York Trust Co.*, 126 F.Supp. 684, 688 (S.D.N.Y. 1954) (under blocking regulations); *contra*, *Chase Manhattan Bank* v. *United China Syndicate, Ltd.*, 180 F.Supp. 848 (S.D.N.Y. 1960). Indeed, in *Orvis* v. *Brownell*, 345 U.S. 183, 186-87 (1953), on which the First Circuit relied, this Court found that an unlicensed lawsuit "determined relationships between creditor and enemy debtor" and in *Zittman* stated that the Custodian could not "annul" judicial attachments.[18]

C. *IEEPA Does Not Give the President Greater Power in Peacetime than TWEA Gives Him in Time of War.*

The Government, in relying on IEEPA, § 1702(a)(1)(B), argues that IEEPA authorizes the President to nullify non-

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[18] This Court in *Orvis* held than an unlicensed state court attachment did not "permit the transfer of a property interest in the blocked funds *which could be asserted against the Custodian*" to prevent vesting of seized assets. 345 U.S. at 187 (emphasis added). As this Court had earlier explained in *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 479 (1947), "When § 5(b)(1) was enacted [in 1941] . . ., it authorized the taking of any property or interest therein of any foreign national. This broadening of the scope of the Custodian's power to vest so as to include interests of friendly aliens in property includes the power to vest the interest which friendly aliens have from pledges." This Court held, however, that pledgees (friendly alien shareholders of the plaintiff) were entitled to compensation for the Custodian's taking of their interests. *Id.* at 480. *See also*, *Guessefeldt* v. *McGrath*, 342 U.S. at 318.

Iranian interests in property, without compensation, and to order the transfer of that property to Iran. The Government argues that the President exercised these powers under the identical language of TWEA and that in IEEPA, Congress gave the President all of his TWEA powers except, as pertinent here, power to "vest" alien property. The Government's argument rests on the implausible proposition that Congress gave the President greater substantive powers, with fewer protections for individual rights, in peacetime than Congress was willing to give the President in TWEA for use in times of war. This argument ignores the legislative history of IEEPA and sixty-four years of judicial construction of TWEA.

As enacted in 1917, 40 Stat. 415, TWEA prohibited all unlicensed wartime trading with the enemy and permitted the President to "investigate, regulate or prohibit" certain international monetary transactions. As amended in 1918, 40 Stat. 1020, TWEA further empowered the President, through an Alien Property Custodian ("Custodian"), to seize enemy property. TWEA § 7(c), 50 U.S.C. App. § 7(c).

The provisions for seizure of enemy property were designed to remove any possibility of benefit to the enemy. However, Congress intended to protect the rights of "innocent claimants, notwithstanding the enforced absence of enemy parties in interest." *See, e.g.*, H.R. Rep. No. 85, 65th Cong. 1st Sess. 4 (1917). Congress provided a federal court remedy for United States citizens to recover their property or debts owed to them by an enemy whose property had been seized. TWEA § 9, 40 Stat. 419-20. As this Court reasoned in *Miller* v. *Robertson*, 266 U.S. 243, 248 (1924), the seizure of enemy property

> "might embarrass or ruin those having business transactions with them. By the taking, the property seized would be put out of reach of persons claiming it, and beyond the power of creditors to attach it for debt. The

> purpose of § 9 was to prevent or lessen losses and inconvenience liable to result to non-enemy persons. This provision is highly remedial and should be liberally construed to effect the purposes of Congress. . . . The just purpose of the section is not to be defeated by a narrow interpretation or by unnecessarily restricting the meaning of the word within technical limitations." *Id.* (citations omitted).

This Court repeatedly stated that TWEA, as it affected non-enemy interests, would be unconstitutional if it did not adequately "secure to the non-enemy owner either the return of his property or compensation for it." *Becker Steel Co. of America* v. *Cummings*, 296 U.S. 74, 79 (1935) (Stone, J.); *see*, *Silesian-American Corp.* v. *Clark*, 332 U.S. at 479-80 (right to compensation implied for seizure of interest of friendly pledgees); *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554, 566 (1921) (Holmes, J.); *Stoehr* v. *Wallace*, 255 U.S. 239, 246 (1921). Moreover, federal courts construed the 1917 version of TWEA to permit suits against the enemy and to allow attachment of enemy property that had not been seized. *Watts, Watts & Co.* v. *Unione Austriaca de Navigazione*, 248 U.S. 9, 22 (1918) (Brandeis, J.).[19] Attachment of enemy property was prohibited after seizure, but the Custodian was required to hold the property pending resolution of the claimant's suit. *See*, TWEA § 9, 40 Stat. 419-20; *see generally*, *Becker Steel Co. of America* v. *Cummings*, 296 U.S. at 79.

In 1941, Congress amended TWEA § 5(b), 55 Stat. 839-40, to provide more effective blocking power. 87 Cong. Rec. 9861

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[19] This is consistent with prior wartime practice. *See*, *Shields* v. *Schiff*, 124 U.S. 351 (1888); *Avegno* v. *Schmidt*, 113 U.S. 293 (1885); *Citizens' Bank of Louisiana* v. *United States*, 87 U.S. (20 Wall.) 114 (1874).

(Dec. 16, 1941) (Rep. Hancock), 9862 (Rep. Gwynne), 9865 (Reps. Kefauver, Williams). This is the language now in IEEPA, § 1702(a)(1)(B), relied on by the Government. The 1941 amendment also added to § 5(b) a new power, to augment § 7(c)'s power to "seize" alien interests in property — the power to vest possession or ownership of such interests in the United States, and to "liquidate," "hold and use" or "dispose" of such property in the national interest. 87 Cong. Rec. 9838 (Dec. 16, 1941) (Sen. Van Nuys), 9862 (Rep. Gwynne), 9865 (Rep. Kefauver); S. Rep. No. 911, 77th Cong. 1st Sess. 2 (1941). Under the 1941 amendment, as before, § 9(a) gave a United States creditor a right to bring an action to recover his interest or debt from alien property seized or vested under the Act. *See, Guessefeldt* v. *McGrath*, *supra*.

TWEA § 5(b), as well as IEEPA, § 1702(a)(1)(B), was not intended by Congress to apply freezing or blocking controls to the interests of United States citizens. *E.g.*, IEEPA House Hearings, *supra*, at 173 (Mr. Santos, Treasury Dept.). The legislative history of the 1941 amendment of TWEA, adding § 5(b), clearly demonstrates that the section as amended was intended to apply only to permit blocking or vesting of alien interests in property, not the interests or property of United States citizens. *See, e.g.*, 87 Cong. Rec. 9863 (Dec. 16, 1941) (Reps. Kefauver, Gwynne), 9865, 9866 (Reps. Williams, O'Hara). This Court has repeatedly given effect to this legislative intent of TWEA by declining to confiscate the interests of United States citizens or alien friends. *See, Kaufman* v. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156, 160 (1952) ("The innocent stockholder may not have title to corporate assets, but he does have an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies"); *Clark* v. *Uebersee Finanz-Korp, A.G.*, 332 U.S. at 487-88; *Becker Steel Co. of America* v. *Cummings*, 296

U.S. at 79 ("But in thus authorizing the seizure of property as a war measure Congress did not attempt the confiscation of the property of citizens or alien friends").

The First and District of Columbia Circuits found that the literal language of IEEPA, § 1702(a)(1)(B), taken verbatim from the first paragraph of TWEA § 5(b), permits the President to "direct and compel" the transfer or delivery of Iranian property out of the United States. In so finding, these courts ignore the other substantive sections of TWEA that are not replicated in IEEPA.[20] TWEA § 7(c) explicitly gives the President the power to order that enemy property "be conveyed, transferred, assigned, delivered or paid over" to the Custodian. This language would be surplusage if the "common language" of TWEA § 5(b) also permitted the President to "direct and compel" the transfer or delivery of funds to a federal official. To give meaning to this specific language of TWEA § 7(c), the "common language" of TWEA § 5(b) must be construed to provide only for the "freezing" or "blocking" of foreign interests in property. Congress' insistence in IEEPA that the President is only authorized to "freeze but not seize" alien property (*see*, *supra*, at 18-19) is thus substantiated by Congress' deletion in IEEPA of the seizure power of TWEA § 7(c), as well as the vesting power of TWEA § 5(b).

The fact that IEEPA has no counterpart to TWEA § 9 confirms that the power to seize was excluded from IEEPA. In TWEA §§ 5(b) and 7(c), Congress specifically provided for executive seizure, vesting and use of alien property, qualified by limitations and safeguards or remedies. IEEPA, by contrast, has no such limitations, safeguards or remedies. As Justice Frankfurter reasoned in reviewing the executive claim of an implied power to seize in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1942):

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[20] For the Court's convenience, Main has provided a chart showing the differences between these statutes in a statutory appendix to this brief.

> "This body of enactments [statutes specifically providing for seizure by the executive] . . . demonstrates that Congress deemed seizure so drastic a power as to require that it be carefully circumscribed whenever the President was vested with this extraordinary authority." 343 U.S. at 598.

The absence in IEEPA of any safeguards or limitations on the asserted authorization to seize (or "nullify") provides conclusive evidence that "[a]uthorization for seizure as an available remedy for potential dangers was unequivocally put aside." *Id.* at 599-600, 602.

The First Circuit reads IEEPA broadly (and the FSIA narrowly) and defers to executive interpretation so as to provide maximum executive authority here. The rationale offered is that foreign affairs are involved. This rationale is inappropriate where the statutes involved are remedial statutes, explicitly intended by Congress to restrict executive power, to protect the interests of United States citizens by preserving a claims fund in the United States, and (in the FSIA) to provide United States court jurisdiction of such claims, free from diplomatic considerations. Such legislation — even in the foreign affairs area — must be construed to effect Congress' remedial purpose. *Miller* v. *Robertson*, 266 U.S. at 248.

Conclusion.

For the foregoing reasons, Chas. T. Main International, Inc. respectfully urges this Court to reverse the judgment below.

Respectfully submitted,

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Dated: June 19, 1981

APPENDIX A — Comparison of Pertinent Sections of TWEA and IEEPA.

II. SECTION 5(b) OF THE TRADING WITH THE ENEMY ACT, 50 U.S.C. APP. § 5(b), AS AMENDED IN THE FIRST WAR POWERS ACT OF 1941, C. 593, 55 STAT. 839-40 (DEC. 18, 1941), PROVIDES IN PERTINENT PART:

(1) During the time of war [or during any other period of national emergency declared by the President], the President may, through any agency that he may designate, [or otherwise,] and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers or credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes;

. . . .

[The remainder of § 5(b) provided for maintenance and production of records]. Material in brackets was deleted from § 5(b)(1) by P.L. 95-223, §§ 101(a), 102, 91 Stat. 1625 (Dec. 28, 1977).

III. THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT, 50 U.S.C. § 1702(a), PROVIDES IN PERTINENT PART:

(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.

[The remainder of 50 U.S.C. § 1702(a) provided for maintenance and production of records and for release from liability.]

I. By resolution approved May 7, 1940, c. 185, § 1, 54 Stat. 179, § 5(b) of the Trading With the Enemy Act of October 6, 1917, 40 Stat. 411, was amended to read, in pertinent part:

During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; . . ..

[The remainder of § 5(b) provided for production of records.]

Appendix B — Pertinent Sections of TWEA for Which There Is No Counterpart in IEEPA.

I. SECTION 7 OF THE TRADING WITH THE ENEMY ACT, 50 U.S.C. APP. § 7, PROVIDES IN PERTINENT PART:

> (c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, chooses [sic] in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act [sections 1-6, 7-39 and 41-44 of this Appendix]. . . .
>
> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act [sections 1-6, 7-39 and 41-44 of this Appendix], and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

II. SECTION 9 OF THE TRADING WITH THE ENEMY ACT, 50 U.S.C. APP. § 9, PROVIDES IN PERTINENT PART:

Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover; sale of claimed property in time of war or during national emergency

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claim-

ant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6, 7-39 and 41-44 of this Appendix], and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated: *Provided further*, That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the United States require the sale of any property or interest or any part thereof claimed in any suit filed under this subsection and pending on or after the date

of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in any such suit in respect of the property or interest or part thereof so sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency, and files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead. If the court finds that the claimant has established an interest, right, or title in any property in respect of which such an election has been served and filed, it shall proceed to determine the amount which will constitute just compensation for such interest, right, or title, and shall order payment to the claimant of the amount so determined. An order for the payment of just compensation hereunder shall be a judgment against the United States and shall be payable first from the net proceeds of the sale in an amount not to exceed the amount the claimant would have received had he elected to accept his proportionate part of the net proceeds of the sale, and the balance, if any, shall be payable in the same manner

as are judgments in cases arising under section 1346 of Title 28. The Alien Property Custodian or any successor officer or agency shall, immediately upon the entry of final judgment, notify the Secretary of the Treasury of the determination by final judgment of the claimant's interest and right to the proportionate part of the net proceeds from the sale, and the final determination by judgment of the amount of just compensation in the event the claimant has elected to recover just compensation for the interest in the property he claimed. . . .

Appendix C — Identification of Parent, Subsidiaries and Affiliates of Chas. T. Main International, Inc. Pursuant to Supreme Court Rule 28.1.

PARENT

Chas. T. Main, Inc. (Chas. T. Main International, Inc. is wholly owned by Chas. T. Main, Inc., which is wholly owned by its employees).

SUBSIDIARIES

None

AFFILIATES

(All are wholly-owned subsidiaries of Chas. T. Main, Inc.)

Chas. T. Main of New York, Inc.
Chas. T. Main of Michigan, Inc.
Chas. T. Main of Virginia, Inc.
CTM Disc, Inc.
Chas. T. Main Canada, Inc.
Buerkell & Co., Inc.
Technical Service Co.
HPN Consultants, Inc.
Main Constructors, Inc.

MOTION FILED
JUN 18 1981

Nos. 80-2078 and 80-2127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2078

DAMES & MOORE, A PARTNERSHIP,

Petitioner,

—v.—

DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-2127

IRAN NATIONAL AIRLINES CORP., THE GOVERNMENT OF IRAN, AND THE UNITED STATES OF AMERICA,

Appellants,

—v.—

THE MARSCHALK COMPANY, INC.,

Appellee.

ON QUESTIONS CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE MARSCHALK COMPANY, INC. TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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THE MARSCHALK COMPANY, INC.,

Appellee.

MOTION OF THE MARSCHALK COMPANY, INC. TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Marschalk Company, Inc. ("Marschalk") respectfully moves this Court for leave to file a brief *amicus curiae* in support of petitioner in *Dames & Moore* v. *Regan*, No.

80-2078. The consents of the attorneys for respondents and for intervenor Bank Markazi Iran have been obtained. The consents of the attorneys for petitioner and intervenor the Government of Iran were requested but were not obtained. In the event this Court consolidates consideration of *Iran National Airlines Corp. et al.* v. *The Marschalk Company, Inc.*, No. 80-2127, with *Dames & Moore*, then Marschalk respectfully requests that the annexed brief be read as Appellee's Brief in No. 80-2127.

THE INTEREST OF THE AMICUS

Marschalk has a substantial interest in the proceedings before this Court. Pursuant to the Order of the United States Court of Appeals for the Second Circuit, *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, Docket Nos. 80-6254, *et al.* (2d Cir. April 9, 1981) (Appendix A hereto), Marschalk's $50,000 contract claim against Iran National Airlines Corp. and the Government of Iran was chosen by the United States District Court for the Southern District of New York (Duffy, J.) as the "single case [among approximately 150 cases against Iran pending in the Southern District of New York] in which the issues raised by the Iranian Agreement and the Presidential Orders are squarely presented . . . ." *Id.* (App. A11). On June 11, 1981, following a factual hearing on the merits of Marschalk's claim, the District Court issued an 89-page opinion holding, *inter alia*, that the President was without statutory or constitutional authority to strip Marschalk of its right to sue on its purely commercial contract claim in a domestic court, and to deprive Marschalk of property rights created by its attachment of Iranian property. *The Marschalk Company, Inc.* v. *Iran National Airlines Corp.*, 79 Civ. 7035 (S.D.N.Y. June 11, 1981).* By order dated June 15, 1981, the Court of Appeals for the Second Circuit certified to this Court, pursuant to § 28

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* This unpublished opinion has been lodged with the Court.

U.S.C., § 1254(3) and Supreme Court Rule 24, certain questions raised by the decision in *Marschalk*. (The order of the Court of Appeals is annexed as Appendix B hereto.)

Marschalk presents substantially the same legal issues raised in *Dames & Moore*, but in the context of a wholly domestic commercial case. We therefore respectfully request leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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Dated: June 19, 1981

QUESTIONS PRESENTED

The Marschalk Company, Inc. ("Marschalk"), a New York advertising agency, supplied advertising services to Iran National Airlines Corp. ("Iran Air"), an instrumentality of the Government of Iran, pursuant to a written agreement dated August 15, 1978. The services were performed exclusively in the United States and were periodically billed to Iran Air's offices in New York. Iran Air stopped paying Marschalk's bills in the fall of 1979 and still owes Marschalk approximately $50,000 for services Marschalk rendered under the contract. In December 1979, Marschalk filed suit against Iran and Iran Air in federal district court. The defendants have not contested Marschalk's services or the amounts at issue. Marschalk's suit thus involves a simple commercial claim ripe for judgment. In these circumstances:

1. Is there anything in the statutes or the Constitution of the United States empowering the President, by executive fiat, to divest Marschalk of its right to litigate its domestic commercial claim in a local court and to force Marschalk to pursue its claim before an Arbitral Tribunal in a foreign land without procedural guarantees, without a right to appeal and without any prospect of a fair recovery?

2. Is there anything in the statutes or the Constitution of the United States empowering the President, by executive fiat, to nullify the property rights obtained by Marschalk, a commercial claimant, pursuant to a judicial attachment secured under New York and federal law and authorized by federal license?

3. If the President was empowered to deprive Marschalk of its right to sue and to nullify its property rights, would such executive action, without compensation, constitute a violation of Marschalk's fifth amendment rights?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

BRIEF OF THE MARSCHALK COMPANY, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER IN NO. 80-2078 AND AS APPELLEE IN NO. 80-2127 1

OPINIONS AND ORDERS BELOW IN NO. 80-2127 . 2

JURISDICTION OF THIS COURT IN NO. 80-2127 .. 2

STATEMENT OF THE CASE 2

ARGUMENT 5

I. THE EXECUTIVE HAS NO STATUTORY OR CONSTITUTIONAL AUTHORITY TO SUSPEND MARSCHALK'S RIGHT TO LITIGATE ITS CLAIM IN FEDERAL DISTRICT COURT. 5

A. The "Claims Settlement Power" Does Not Justify the Executive's Actions. 6

1. Marschalk's claim has not been settled. . 6

2. The claims settlement power has never included power to terminate or suspend litigation over domestic commercial claims. 7

3. The Foreign Sovereign Immunities Act removes Marschalk's commercial claim from any historical claims settlement power. 9

B. The "Change in Law" Argument Is a Fiction. 10

PAGE

II. THE EXECUTIVE ORDERS AND REGULATIONS IMPROPERLY ATTEMPT TO NULLIFY MARSCHALK'S ATTACHMENT RIGHTS..... 12

A. Only the Licenses Were Revocable. 13

B. The Conditional Nature of the License Does Not Eliminate Marschalk's Rights..... 14

C. Under Prior Decisions of This Court, Marschalk Acquired a Property Interest by Reason of its Attachment..... 15

CONCLUSION..... 17

APPENDICES

A. Order, *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, Docket Nos. 80-6254 et al. (2d Cir. Apr. 9, 1981).

B. Order Certifying Questions to the Supreme Court of the United States, *The Marschalk Company, Inc.* v. *Iran National Airlines Corp.*, Docket Nos. 80-6254 et al. (2d Cir. June 15, 1981)

TABLE OF AUTHORITIES

CASES	PAGE
Acton v. *United States*, 401 F.2d 896 (9th Cir. 1968), *cert. denied*, 395 U.S. 945 (1969)	13
American International Group, Inc. v. *Iran*, Docket Nos. 80-1779 *et al.* (D.C. Cir. June 5, 1981)	6 n.5
Armstrong v. *United States*, 364 U.S. 40 (1960)	12
Bradley v. *Richmond School District*, 416 U.S. 696 (1974)	12 n.11
Isthmian Airways, Inc., v. *United States*, 94 Ct. Cl. 598 (1941)	13
Louisville Joint Stock Land Bank v. *Radford*, 295 U.S. 555 (1935)	12
The Marschalk Company, Inc. v. *Iran National Airlines Corp.*, Docket Nos. 80-6254 *et al.* (2d Cir. June 15, 1981)	*passim*
The Marschalk Company, Inc. v. *Iran National Airlines Corp.*, 79 Civ. 7035 (S.D.N.Y. June 11, 1981)	*passim*
New England Merchants National Bank v. *Iran Power Generation and Transmission Co.*, Docket Nos. 80-6254 *et al.* (2d Cir. Apr. 9, 1981)	*passim*
New England Merchants National Bank v. *Iran Power Generation and Transmission Co.*, 508 F. Supp. 49 (S.D.N.Y. 1980)	3
New England Merchants National Bank v. *Iran Power Generation and Transmission Co.*, 502 F. Supp. 120 (S.D.N.Y. 1980)	3
Orvis v. *Brownell*, 345 U.S. 183 (1953)	15, 16
Texas Trading & Milling Corp. v. *Federal Republic of Nigeria*, Docket Nos. 644 *et al.* (2d Cir. Apr. 16, 1981)	10

PAGE

United States v. *Belmont*, 301 U.S. 324 (1937) 6 n.5

United States v. *Fuller*, 409 U.S. 488 (1973)..... 13

United States v. *Midwest Oil Co.*, 236 U.S. 459 (1915) . 7

United States v. *Pink*, 315 U.S. 203 (1942) 6 n.5

United States v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).....7 n.7, 10, 11, 12

West Virginia Pulp & Paper Co. v. *Peoples Home Journal, Inc.*, 233 App. Div. 376, 253 N.Y.S. 178 (1st Dept. 1931) 12

Zittman v. *McGrath*, 341 U.S. 446 (1951) 15, 16

Zittman v. *McGrath*, 341 U.S. 471 (1951) 15 n.14

CONSTITUTIONAL PROVISIONS

Article Two, United States Constitution 12

Fifth Amendment, United States Constitution ..12, 13 & n.12

STATUTES, TREATIES, REGULATIONS, EXECUTIVE ORDERS AND RULES

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.* 5, 9, 10

28 U.S.C. § 1330..... 10

International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* 12, 13 n.12, 16

Trading With the Enemy Act, 50 U.S.C. App. §§ 1 *et seq.* 15, 16

22 U.S.C. § 1622(c) 9

22 U.S.C. § 1623 9

PAGE

22 U.S.C. § 1643 9

28 U.S.C. § 1254(3) 2

Treaty of Amity, Economic Relations and Consular Rights Between the United States and Iran, 8 U.S.T. 900 (entered into force June 16, 1957) .....5, 6 & n.6

Agreement Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims, T.I.A.S. 9306 (1979)..... 8

Agreement Between the Government of the United States of America and the Government of Egypt, T.I.A.S. 9589 (1979)..... 8 n.9

Agreement Between the Government of the United States of America and the Government of Peru, 27 U.S.T. 3993, T.I.A.S. 8417 (1976) 8 n.8

Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Concerning the Settlement of Claims, 24 U.S.T. 522, T.I.A.S. 7569 (1973) 8 n.9

Agreement Between the Government of the United States of America and the Government of Canada Concerning the Settlement of Claims Relating to Gut Dam, 19 U.S.T. 7863, T.I.A.S. 6624 (1968) 9 n.10

Agreement Between the Government of the United States of America and the Government of Canada Concerning the Establishment of an International Arbitral Tribunal to Dispose of United States Claims Relating to Gut Dam, 17 U.S.T. 1566, T.I.A.S. 6114 (1966) 9 n.10

Agreement Between the Government of the United States of America and the Government of Yugoslavia, 16 U.S.T. 1 (1965)..... 8 n.8

PAGE

Agreement Between the Government of the United States of America and the Government of the People's Republic of Bulgaria Concerning Claims of United States' Nationals and Related Financial Matters, 14 U.S.T. 969, T.I.A.S. 5387 (1963) 8 n.9

Agreement Between the Government of the United States of America and the Government of the Rumanian People's Republic Relating to Financial Questions Between the Two Countries, 11 U.S.T. 317, T.I.A.S. 4451 (1960) 8 n.9

Agreement Between the Government of the United States of America and the Government of the Polish People's Republic, 11 U.S.T. 1953, T.I.A.S. 4545 (1960) 8 n.8

Declaration of the Government of the Democratic and Popular Republic of Algeria Initialed January 19, 1981 ("Agreement I") 3, 5

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran Initialed January 19, 1981 ("Agreement II") 3, 7

Iranian Assets Control Regulations, 31 C.F.R. Part 535 (1980) 2, 3, 13

Executive Order No. 12,279, 46 Fed. Reg. 7919 (Jan. 23, 1981) 3

Executive Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 26, 1981) 3, 5

Reorganization Plan 1, 19 Fed. Reg. 3985, 68 Stat. 1279 (1954) 9

Fed. R. Civ. P. 64 3

PAGE

Fed. R. Civ. P. 12(b)(6) 12 n.11

Supreme Court Rule 24 2

N.Y. C.P.L.R. § 6201 *et seq.* 3

N.Y. C.P.L.R. § 6211(b) 3

MISCELLANEOUS AUTHORITIES

H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. (1976) 10

President Carter's Message to Congress, 15 Weekly Comp. of Pres. Docs. 2117 (Nov. 14, 1979) 14

Iranian Assets Litigation Rptr., Dec. 5, 1980, ... 14 n.13

N.Y. Times, Nov. 3, 1980 ..... 14 n.13

N.Y. Times, Dec. 22, 1980 ..... 14 n.13

Wall St. J., Nov. 3, 1980 ..... 14 n.13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2078

DAMES & MOORE, A PARTNERSHIP,

Petitioner,

—v.—

DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES OF AMERICA,

Respondents.

No. 80-2127

IRAN NATIONAL AIRLINES CORP., THE GOVERNMENT OF IRAN, AND THE UNITED STATES OF AMERICA,

Appellants,

—v.—

THE MARSCHALK COMPANY, INC.,

Appellee.

BRIEF OF THE MARSCHALK COMPANY, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER IN NO. 80-2078 AND AS APPELLEE IN NO. 80-2127

OPINIONS AND ORDERS BELOW IN NO. 80-2127

The unreported opinion of the United States District Court for the Southern District of New York (Duffy, J.) in *The Marschalk Company, Inc.* v. *Iran National Airlines, Inc.*, 79 Civ. 7035 (S.D.N.Y. June 11, 1981), has been lodged with the Court. The order of the United States Court of Appeals for the Second Circuit certifying questions to this Court on June 15, 1981, pursuant to 28 U.S.C. § 1254(3) and Supreme Court Rule 24, is reprinted as Appendix B hereto.

JURISDICTION OF THIS COURT IN NO. 80-2127

The opinion of the District Court was filed June 11, 1981, with directions to the parties to seek immediate rehearing by the Court of Appeals, which had retained jurisdiction. *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, Nos. 80-6254 *et al.*, (2d Cir. Apr. 9, 1981) (App. A11). On June 15, 1981, upon the motion of certain bank-garnishees, the Court of Appeals certified questions to this Court, pursuant to 28 U.S.C. § 1254(3) and Supreme Court Rule 24. The certification was docketed with this Court on June 16, 1981.

STATEMENT OF THE CASE

The circumstances that have transformed Marschalk's ordinary contract claim into a "test case" of national significance are set forth in detail in the decision of the District Court and in the order of the Court of Appeals certifying questions to this Court (App. B2-4). We repeat that history here in abbreviated form.

Following the seizure of American hostages in Tehran on November 4, 1979, the President blocked the assets of Iran held by United States citizens and corporations. 31 C.F.R. § 535.201 (Nov. 14, 1979).

Pursuant to general licenses issued by executive order[1] and the provisions of federal and New York State law,[2] Marschalk obtained an *ex parte* order of prejudgment attachment on December 28, 1979 against assets of Iran and Iran Air in the Southern District of New York. (App. B3.) Marschalk levied upon these assets and, pursuant to federal and New York State law,[3] moved within 5 days to confirm the order of attachment. That motion was stayed pending resolution of common issues of law in 95 other cases in the District Court. *See New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, 502 F. Supp. 120 (S.D.N.Y. 1980).

On September 26, 1980, the District Court ruled that assets of Iran and its instrumentalities were not immune from prejudgment attachment, 502 F. Supp. at 129-32; the District Court then certified an appeal of certain of the immunity questions pursuant to 28 U.S.C. § 1292(b), *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, 508 F. Supp. 49 (S.D.N.Y. 1980).

During the pendency of this interlocutory appeal, on January 19, 1981, President Carter concluded the Declaration of the Government of the Democratic and Popular Republic of Algeria ("Agreement I") and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Agreement II"). He also issued Executive Order No. 12,279, 46 Fed. Reg. 7919 (Jan. 19, 1981), purporting to terminate this and all other similar litigation and to nullify the attachments in this and all other similar cases. Thereafter, President Reagan ratified his predecessor's acts in Executive Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 26, 1981).

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1 31 C.F.R. § 535.504(a) (Nov. 23, 1979); 31 C.F.R. § 535.418 (Dec. 19, 1979).

2 Fed. R. Civ. P. 64; N.Y. C.P.L.R. §§ 6201 *et seq.*

3 Fed. R. Civ. P. 64; N.Y. C.P.L.R. § 6211(b).

By reason of these dramatic intervening events, the Court of Appeals for the Second Circuit remanded the consolidated cases to the District Court with instructions "to join the United States as a party in a single case in which the issues raised by the Iranian Agreement and the Presidential Orders are squarely presented and to proceed with confirmation hearings in that case alone." *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, Docket Nos. 80-6254 *et al.* (2d Cir. Apr. 9, 1981) (App. A11).

Following that directive, the District Court chose Marschalk's action as the test case and proceeded to hold a factual hearing. On June 11, 1981, the District Court issued an 89-page opinion granting Marschalk's motion to confirm its attachment, denying defendants' motion to vacate the attachment and denying Iran's motion to dismiss the complaint on grounds of sovereign immunity. In so ruling, the District Court held that the President was without statutory or constitutional authority to strip Marschalk of its right to sue on a purely commercial contract claim in a domestic court, and to deprive Marschalk of property rights created by its attachment of Iranian property.

On June 15, 1981, on the motion of several garnishee banks, the Court of Appeals for the Second Circuit certified to this Court three questions raised by the District Court decision. *The Marschalk Company, Inc.* v. *Iran National Airlines Corp.*, Docket Nos. 80-6254 *et al.* (2d Cir. June 15, 1981) (App. B).

ARGUMENT[4]

I.

THE EXECUTIVE HAS NO STATUTORY OR CONSTITUTIONAL AUTHORITY TO SUSPEND MARSCHALK'S RIGHT TO LITIGATE ITS CLAIM IN FEDERAL DISTRICT COURT.

The District Court in *Marschalk* correctly held that the President exceeded his authority in seeking to suspend or terminate the jurisdiction of the federal courts to adjudicate Marschalk's claim against Iran. There is no statute authorizing the President "to terminate all litigation," Agreement I, ¶ B, to "suspen[d]" all claims "which may be presented to the Iran-United States Claims Tribunal," Executive Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 26, 1981), or to declare that "all such claims shall have no legal effect in any action now pending in any court of the United States . . . ." *Id.*

The Government urges that statutory authority is in any event unnecessary, because the President possesses inherent constitutional power to take such action. This so-called "claims settlement power," it is contended, allows the President to interfere with the express jurisdiction of Article III courts over ordinary commercial claims. We most respectfully disagree. As demonstrated below, the broad inherent power claimed by the Government simply does not exist. The executive in fact has limited powers in settling expropriation and nationalization claims against foreign states, and even those limited powers are circumscribed by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* (1976) ("FSIA"), and the Treaty of Amity, Economic Relations and Consular

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4 In this brief, Marschalk has attempted not to repeat many of the constitutional and statutory arguments made in other *amicus* briefs filed in support of the petitioner in *Dames & Moore*. Marschalk specifically joins in the arguments made in the *amicus* brief of Chas. T. Main International, Inc.

Rights between the United States and Iran, 8 U.S.T. 900 (entered into force June 16, 1957) (the "Treaty of Amity").

As we also describe below, the District Court properly rejected the legal fiction proferred by the Government that the Agreements and Executive Orders were valid because they constituted merely a "change in law." Whatever nominclature the Government uses, the Executive has no power to expropriate the commercial claim of a domestic corporation for public purposes and relegate the claimant—against its will—to uncertain arbitration in a foreign nation.

A. The "Claims Settlement Power" Does Not Justify the Executive's Actions.

The Government does not seriously contend that there exists a statutory basis for the President's action. Rather, it looks to a penumbral "claims settlement power" to justify the Iranian accords.[5] However, as the District Court held, there is no claims settlement power that can be asserted over Marschalk's domestic commercial claim. Moreover, the Executive did not "settle" Marschalk's claim; it expropriated the claim and used it as a bargaining chip to settle an international crisis.

1. Marschalk's claim has not been settled.

The only settlements achieved by the President's Iranian accords were (1) release of the 52 hostages held by Iran and (2) payment of $3.4 billion to various American banks.

Marschalk's claim was not settled. Marschalk has not been paid one penny and has no assurances that it will ever be paid.[6]

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5 Although the Government has argued that the President's action was also justified by the Executive's general Article II powers with respect to the conduct of foreign affairs, this assertion has been rejected in *American International Group, Inc.* v. *Iran*, Nos. 80-1779 *et al.*, Typed Opinion at 17 (D.C. Cir. June 5, 1981), and *The Marschalk Company, Inc.* v. *Iran National Airlines Corp.*, *supra*, Dist. Ct. Opinion at 48-51, *distinguishing United States* v. *Belmont*, 301 U.S. 324 (1937), and *United States* v. *Pink*, 315 U.S. 203 (1942).

6 Ironically, had the case not been "settled" by the Executive, Marschalk could have recovered its $50,000 long ago. Even without its prejudg-

Instead, this so-called settlement bars Marschalk from the local federal court in which it has litigated its claim and which has already held (1) that Marschalk has demonstrated a probability of success on the merits and (2) that there are no defenses to the claim. *Marschalk* Dist. Ct. Opinion at 85-87. "Settlement" of Marschalk's claim by the Executive also means "transfer" of the claim to a distant, unfamiliar and uncertain forum in a foreign country, without procedural guarantees and without any right of appeal.

Moreover, because Marschalk's claim is for $50,000, Marschalk will not be represented before this foreign arbitration Tribunal by counsel of its own choice or have any control over the presentation of its claim before the Tribunal. Agreement II, Art. III, ¶ 3. Instead, Marschalk's claim will be presented by the same Executive that has already ousted Marschalk from the federal court and nullified its attachment rights. While it is suggested that the Government's representation is a method to present the small claims economically, the practical result is that Marschalk's claim will be subject to further compromise—for whatever procedural or political ends the Executive deems important at the time.

2. The claims settlement power has never included power to terminate or suspend litigation over domestic commercial claims.

If there is an executive claims settlement power, its source is its existence as a "long-continued" practice. *Cf. United States* v. *Midwest Oil Co.*, 236 U.S. 459, 471-73 (1915) (executive's power to withdraw lands from private acquisition). However, that power cannot be stretched to justify "settlement" of Marschalk's domestic commercial claim. None of the historical precedents cited by the Government involves facts even remotely like those in *Marschalk*.[7]

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ment attachment of Iranian assets, the judgment would have been enforceable against Iranian assets located elsewhere. *E.g.*, Treaty of Amity, *supra*, Art. XI, ¶ 4.

7 Settlements by treaty, such as in *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), are inapposite here.

Recent executive settlement agreements cited by the Government typically deal with claims arising from a foreign government's expropriation of American-owned property abroad, and not with claims arising from normal commercial transactions in the United States. The China accords of 1979, for example, settled claims stemming from China's expropriation and nationalization of property in China 30 years earlier. Agreement Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims, T.I.A.S. 9306 (1979).[8] To the extent any recent agreements have dealt with obligations arising out of commercial arrangements,[9] the Government has yet to show that the settlements encompassed obligations arising from commercial transactions in the United States between American nationals and the foreign state.

Moreover, the customary procedures of past executive claims settlements stand in marked contrast to the procedures imposed by the Iranian Agreements. Recent executive agreements

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8 Other agreements demonstrate similar purposes. The Peruvian Agreement of 1976 concerned only the expropriated assets in Peru of an American mining company. Agreement Between the Government of the United States of America and the Government of Peru, 27 U.S.T. 3993, T.I.A.S. 8417 (1976). The Yugoslavian settlement dealt solely with compensation for claims arising from nationalization. Agreement Between the Government of the United States of America and the Government of Yugoslavia, 16 U.S.T. 1 (1965). The Polish agreement treated nationalized property and related debts arising outside the United States. Agreement Between the Government of the United States of America and the Government of the Polish People's Republic, 11 U.S.T. 1953, T.I.A.S. 4545 (1960).

9 *E.g.*, Agreement Between the Government of the United States of America and the Government of Egypt, T.I.A.S. 9589 (1979); Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Concerning the Settlement of Claims, 24 U.S.T. 522, T.I.A.S. 7569 (1973); Agreement Between the Government of the United States of America and the Government of the People's Republic of Bulgaria Concerning Claims of United States' Nationals and Related Financial Matters, 14 U.S.T. 969, T.I.A.S. 5387 (1963); Agreement Between the Government of the United States of America and the Government of the Rumanian People's Republic Relating to Financial Questions Between the Two Countries, 11 U.S.T. 317, T.I.A.S. 4451 (1960).

have involved adjudication of claims by a statutorily created domestic claims commission. *See*, *e.g.*, 22 U.S.C. § 1643 (Cuba and China). Such a foreign claims settlement commission is composed of American members and answers to the Secretary of State, *see* 22 U.S.C. § 1622(c); Reorganization Plan 1, 19 Fed. Reg. 3985, 68 Stat. 1279 (1954). It offers procedural safeguards such as hearings, opportunity for objection, and the availability of subpoenas. *See* 22 U.S.C. § 1623. The commission typically evaluates the claims in preparation for the Executive's settlement negotiations with the foreign government.[10]

We are aware of no occasion in the history of executive claims settlements when the Executive exercised his settlement power by terminating or suspending domestic commercial claims pending in American courts and sending them to a foreign arbitral tribunal. Likewise, the Government can point to no prior "settlement" where an executive during peacetime purported to "nullify" attachments existing in pending domestic litigation.

3. The Foreign Sovereign Immunities Act removes Marschalk's commercial claim from any historical claims settlement power.

In any event, past executive claims settlements are of no precedential value in analyzing Marschalk's rights because congressional enactment in 1976 of the FSIA significantly altered the rules.

As set forth in the briefs of other *amici*, passage of the FSIA effectively gave Marschalk a judicial "claims settlement" pro-

10 Another settlement procedure involves establishment of a tribunal to adjudicate claims arising from an event with international implications. For example, a claims commission was established to hear claims for property damage caused by construction of a dam on the St. Lawrence River. *See* Agreement Between the Government of the United States and the Government of Canada Concerning the Establishment of an International Arbitral Tribunal to Dispose of United States Claims Relating to Gut Dam, 17 U.S.T. 1566, T.I.A.S. 6114 (1966), Agreement Between the Government of the United States of America and the Government of Canada Concerning the Settlement of Claims Relating to Gut Dam, 19 U.S.T. 7863, T.I.A.S. 6624 (1968).

cedure which replaced whatever executive procedure formerly existed. *See Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, Docket Nos. 644 *et al.*, Slip Op. at 2602 (2d Cir. Apr. 16, 1981) (Congress enacted the FSIA specifically to provide "access to the courts to those aggrieved by the commercial acts of a foreign sovereign").

Significantly, the drafters of the FSIA specifically excluded from an early version of the Act provisions that would have empowered the executive branch to limit the FSIA's reach by *future* executive agreements. These provisions were deleted "to eliminate any possible question that this language might be construed to authorize a future international agreement" interfering with the FSIA's jurisdictional grant. H. R. Rep. No. 94-1487, 94th Cong., 2d Sess. 10 (1976).

Here, it is apparent that the Executive is seeking to limit Marschalk's right established by the FSIA to sue on its commercial claim in a federal court. Congress rejected this effort by the Executive when the Executive sought to have such power written into the FSIA, and this Court should reject the Executive's present attempt to rewrite the statute by executive fiat.

B. The "Change in Law" Argument Is a Fiction.

The Government contends that the termination or suspension of Marschalk's claim does not involve the FSIA jurisdiction of the federal court under 28 U.S.C. § 1330, but instead represents a change in the substantive law the Court must apply, citing *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). We have been unable to discover, however, what law has been changed. Has the Executive rewritten the New York law of contracts? Has he amended title 28 of the United States Code?

In any case, the change of law argument fails not only because it is a legal mirage, but because, as the Court of Appeals for the Second Circuit has noted (App. A8), it begs the question as to the legality of the Agreements themselves.

The Government's reliance on *United States* v. *The Schooner Peggy*, *supra*, highlights the weakness of its "change of law" argument. In that case, a privateer had claimed the schooner Peggy pursuant to an Executive commission to capture armed French ships on the high seas. While the decision condemming the Peggy for the benefit of the privateer was on appeal, France and the United States entered into a treaty, withdrawing the commission and requiring the return of captured vessels not subject to finally adjudicated claims. No one challenged the power of the Executive (and Senate) to enter into the treaty, 5 U.S. at 110, and, accordingly, the Court held that the treaty required return of the Peggy and its contents. The principle for which *Schooner Peggy* stands is thus relatively simple: when a treaty effectively revokes the prior basis for a claim, the treaty is entitled to be enforced.

Marschalk's case is entirely different. The law upon which Marschalk's lawsuit was based is both substantive (the state common law of contracts) and procedural (the federal statutory law of personal and subject matter jurisdiction). We do not believe the Government seriously contends that the Executive is empowered to alter state contract law. Likewise, the Executive has no power unilaterally to alter acts of Congress conferring jurisdiction on federal district courts. The principle enunciated by this Court in *Schooner Peggy*, we submit, simply has no application here. The law on which Marschalk's claim is based cannot be and has not been altered by the Executive.

The suggestion that the forced "settlement" of Marschalk's claim constitutes a change in law supported by *Schooner Peggy* is equally groundless. The Court in *Schooner Peggy* simply did not consider whether the treaty constituted a settlement of the privateer's claims. In any case, the Government's present "settlement" did not pay any part of Marschalk's outstanding claim. The international crisis was indeed settled, but Marschalk is now forced to pursue its meritorious claim in a distant

forum where, years from now, it may receive a fraction of the claim's real value.[11]

II

THE EXECUTIVE ORDERS AND REGULATIONS IMPROPERLY ATTEMPT TO NULLIFY MARSCHALK'S ATTACHMENT RIGHTS.

The District Court properly held that Marschalk's attachment, obtained pursuant to license on December 28, 1979, conferred valid property rights, *Marschalk* Dist. Ct. Opinion at 76, *citing West Virginia Pulp & Paper Co.* v. *Peoples Home Journal, Inc.*, 233 App. Div. 376, 253 N.Y.S. 178 (1st Dept. 1931), that cannot be confiscated by the Government in the absence of statutory and constitutional authority and without just compensation. *Marschalk* Dist. Ct. Opinion at 76-77, *citing Armstrong* v. *United States*, 364 U.S. 40 (1960); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935).

The Government nonetheless argues that the nullification order was directly authorized by Article II of the Constitution and by the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* ("IEEPA"). Further, the Government contends that the taking of Marschalk's attachment does not violate Marschalk's fifth amendment rights because the license pursuant to which the attachment was granted was revocable. Thus, argues the Government, Marschalk was on notice that its attachment was conditional and that it had no reasonable

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11 We also respectfully disagree with the notion expressed by the First and District of Columbia Circuits that the "settlements" somehow created the grounds for a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The facts pleaded in Marschalk's complaint stated a claim in December 1979 and they state a claim today.

In the event this Court finds that there has been a change in law, we respectfully submit that to permit such a change to deprive Marschalk of its claims would cause a manifest injustice. The new law therefore should not be applied. *See Bradley* v. *Richmond School District*, 416 U.S. 696, 711-21 (1974).

expectation of compensable property rights. Each of the Government's contentions must fail.[12]

A. Only the Licenses Were Revocable.

The Government argues that Marschalk has no compensable interest in the property levied upon pursuant to its attachment because the license authorizing prejudgment attachment of Iranian assets is revocable. But nothing in the regulations cited by the Government (31 C.F.R. §§ 535.203, 535.418, 535.504 & 535.805), renders the *attachment* rights obtained pursuant to such a license revocable as well. The regulations purport only to warn a claimant that the *license* may be "amended, modified or revoked . . . ." 31 C.F.R. § 535.805 (Nov. 14, 1979).

Such a revocation would bar a subsequent attachment, but, as the District Court correctly held, the "revocation" cases relied upon by the Government do not support nullification of the property rights created by the attachments secured pursuant to an existing, unrevoked license. In each case, although revocation of a prior government license was upheld, the licensee was not divested of the property acquired before revocation. *Marschalk* Dist. Ct. Opinion at 79-81, *distinguishing United States* v. *Fuller*, 409 U.S. 488 (1973); *Acton* v. *United States*, 401 F.2d 896 (9th Cir. 1968), *cert. denied*, 395 U.S. 945 (1969); *Isthmian Airways, Inc.* v. *United States*, 94 Ct. Cl. 598 (1941).

The revocation theory now advanced by the Government has been recently minted. It was not raised in any of the numerous Statements of Interest filed by the Government before January 19, 1981 in support of its requests for stays of lower court

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12 Marschalk joins in the argument made in the Brief of Chas. T. Main International, Inc. as Amicus Curiae in Support of Petitioner in *Dames & Moore* that the President lacked authority under IEEPA to nullify Marschalk's attachment rights; in effect the President seized those property rights, even though such power was withdrawn by Congress in 1977. Additionally, Marschalk relies upon the fifth amendment arguments made in the Brief of Amicus Curiae in Support of Petitioner's Right to Compensation in *Dames & Moore*.

proceedings. Similarly, prior to January 19, 1981 representatives of the Government repeatedly acknowledged that the attachment rights of United States claimants prevented the United States from simply lifting the freeze of Iranian assets and releasing the assets to Iran in exchange for the hostages.[13]

B. The Conditional Nature of the License Does Not Eliminate Marschalk's Rights.

The Government also argues that because the regulations prohibited Marschalk from taking possession of the attached assets or executing a judgment against them without a further license, Marschalk and the other plaintiffs cannot complain of nullification because they were on notice that their attachment rights might ultimately be valueless.

Marschalk did not engage in a meaningless gesture when it obtained an order of attachment in December 1979. President Carter, in announcing the blocking order to Congress, specifically stated that one purpose was to assist and protect American creditors' rights. President Carter's Message to Congress, 15 Weekly Comp. of Pres. Docs. 2117 (Nov. 14, 1979). Marschalk had every reason to rely upon such statements and to expect that, at a later time and under the proper circumstances, further licenses would issue allowing entry of judgment and collection of attached assets. Marschalk's reliance cannot be ignored. *See Marschalk* Dist. Ct. Opinion at 81.

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13 *See N.Y. Times*, Dec. 22, 1980, at A-1, A-13, col. 1; *N.Y. Times*, Nov. 3, 1980, at A-1, A-15, col. 2; *Wall St. J.*, Nov. 3, 1980, at A-3, col. 2; Iranian Assets Lit. Rptr., Dec. 5, 1980, at 1,906 ("Secretary [of State] Muskie added that [President] Carter cannot go beyond a certain point [in the negotiations], and Iran must understand 'the legal constraints within which we must operate.' Those legal constraints, sources say, preclude any effort to override court attachments to return Iran's assets."); *id.* at 1,908 ("[T]he U.S. is continuing to spell out to Iran the limits of the Executive's authority over the Judicial Branch.").

C. Under Prior Decisions of This Court, Marshalk Acquired a Property Interest by Reason of its Attachment.

The Government argues that the decision of this Court in *Orvis* v. *Brownell*, 345 U.S. 183 (1953), put Marschalk on notice that its attachment rights could be annulled at any time by the Government. We respectfully submit that the Government has misread *Orvis*. In fact, *Orvis* and its predecessor, *Zittman* v. *McGrath*, 341 U.S. 446 (1951) ("*Zittman I*"), hold that, despite executive vesting orders, valid and authorized attachments protect the rights of domestic creditors against foreign debtors. As a consequence, under these cases, even where the Executive is authorized by statute to take possession of attached foreign property, which is not the case here, it cannot dispose of that property by simply returning it to its original foreign owners.

Thus, in *Zittman I*, *supra*, the Court held that attachments obtained under New York law after a blocking order create rights against the original foreign owners that were not cancelled or annulled under a vesting order issued by the Executive pursuant to the Trading With the Enemy Act, 50 U.S.C. App. § 5(b). Significantly, in *Zittman I*, the initial blocking order did not prohibit attachment liens; a redefinition of the terms of the blocking order, issued after the creditors' attachments were obtained, was held ineffective as to the prior attachments.[14] Here, although the original blocking order prohibited attachments, that prohibition was lifted prior to the time Marschalk obtained its attachment liens against Iran's assets in New York.

This holding was expressly reaffirmed by the Court in *Orvis* v. *Brownell*, *supra*, 345 U.S. at 186, and is not affected by the additional holding of *Orvis* that an unauthorized attachment

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14 In a second case, *Zittman* v. *McGrath*, 341 U.S. 471 (1951), the Court held that pursuant to a federal vesting order directing that identified funds be turned over to him, the Alien Property Custodian "has power to possess himself of the funds and to administer them" for the payment of debts to American creditors. 341 U.S. at 474.

secured after issuance of a federal blocking order was not enforceable against the Alien Property Custodian who later took possession of the foreign assets for the benefit of all domestic claimants.

Orvis v. *Brownell* confronted factual and legal conditions materially different from those now before this Court. First, unlike the *Orvis* claimant, Marschalk obtained attachment rights pursuant to a license granted by the Government. Second, in *Orvis* the Alien Property Custodian, acting pursuant to the Trading with the Enemy Act, was clearly authorized to vest frozen assets and take them into possession. Vesting is not authorized in the instant cases under IEEPA.

Here, the Government argues that it is merely transferring foreign assets, within the literal language of IEEPA. In fact, under the Iranian Agreements, the Government intends to release approximately $1.2 billion of blocked financial assets directly to Iran, *see* Agreement I, ¶ 7, notwithstanding Marschalk's attachment. Another $1 billion of blocked financial assets will be transferred to a separate foreign escrow account, reportedly at the Bank of England, to satisfy the awards of the arbitral Tribunal, *id.*, again notwithstanding Marschalk's attachment.

As to the assets destined to be paid directly to Iran, the principle of *Zittman I*, as reaffirmed in *Orvis*, supports the conclusion that the order unblocking the Iranian assets does not affect Marschalk's attachment lien as against the Iranian debtor. Therefore, the assets cannot be released to Iran free of Marschalk's lien. As to the assets destined for the Bank of England, the purported "transfer" can be viewed as either a vesting of the assets by the Government or an indirect release of the assets for the benefit of Iran. Under either of these interpretations, the Executive's naked "transfer" is unlawful. As other *amici* argue, if the transfer is a vesting, it is unlawful under IEEPA and is not authorized by *Orvis*. If the transfer is an indirect release of assets to Iran, then according to *Zittman I*, the Government cannot extinguish Marschalk's attachment lien.

CONCLUSION

For the foregoing reasons, The Marschalk Company, Inc. respectfully requests this Court to (1) reverse the District Court decision in *Dames & Moore* v. *Regan*, No. 80-2078; (2) answer questions one and two certified by the Court of Appeals for the Second Circuit in *Iran National Airlines Corp.* v. *The Marschalk Company, Inc.*, No. 80-2127, in the negative, and question three in the affirmative; and (3) affirm in its entirety the District Court decision in No. 80-2127.

Respectfully submitted,

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Dated: June 19, 1981

CERTIFICATE OF SERVICE

I am a member of the bar of this Court and hereby certify that prior to 3:00 p.m. on this 19th day of June, 1981, I caused to be served three copies of the foregoing Brief by hand to the attorneys for the parties at the following addresses:

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I further certify that all parties required to be served have been served.

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June 19, 1981

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1049-1144, 1145-1224, 1225-1227, 740

September Term, 1980

(Argued March 30, 1981 Decided April 9, 1981)

Consolidated Appeals Docket Nos.
80-6254 through 80-6349 inclusive, and
related Docket Nos. 80-7912 through 80-7999,
81-7054, 81-7062 and 81-7064, 80-3063,
80-9001, 80-9004 through 80-9007

NEW ENGLAND MERCHANTS NATIONAL BANK,

Plaintiff-Appellee,

—v.—

IRAN POWER GENERATION AND TRANSMISSION COMPANY, THE IRANIAN MINISTRY OF ENERGY AND NATURAL RESOURCES, THE GOVERNMENT OF IRAN, THE IRANIAN MINISTRY OF ECONOMIC AFFAIRS AND FINANCE,

Defendants-Appellants,

UNITED STATES OF AMERICA,

Appellant.

(and related cases)

App. A 2

Docket No. 80-3063

IN RE: UNITED STATES OF AMERICA,

Petitioner.

Before:

TIMBERS, VAN GRAAFEILAND and MESKILL,
Circuit Judges.

Interlocutory appeal from a judgment of the United States District Court for the Southern District of New York (Duffy, *J.*) ruling that certain Iranian defendants were not entitled to sovereign immunity from prejudgment attachment pursuant to *ex parte* attachment orders issued under N.Y. Civ. Prac. L. R. § 6211(a) (McKinney 1980). Appeal from, and petition for a writ of mandamus regarding, denial of the United States' request for an indefinite stay.

Remanded.

[appearances omitted]

MESKILL, *Circuit Judge*:

The plaintiffs in these 96 consolidated cases are commercial entities with claims against the Islamic Republic of Iran and various of its agencies or instrumentalities (hereinafter collectively referred to as "Iran"). After witnessing a period of worsening political and economic relations, which culminated in the seizure of the American Embassy in Teheran and its personnel on November 4, 1979, the plaintiffs brought suit against Iran under the Foreign Sovereign Immunities Act of

1976, 28 U.S.C. §§ 1330, 1602-11 (Supp. III 1979) (FSIA). Upon commencing suit, the plaintiffs sought and obtained pursuant to N. Y. Civ. Prac. L. R. § 6211(a) (McKinney 1980) *ex parte* orders of prejudgment attachment upon the "frozen" Iranian assets in New York.[1] At the subsequent confirmation hearings,[2] the Iranian defendants moved to vacate the attachments, arguing that a foreign state and its instrumentalities are immune from prejudgment attachment under the FSIA and the 1955 Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 8 U.S.T. 899 ("Treaty of Amity").[3] These cases were referred to Judge Duffy for resolution of the sovereign immunity issue.

On September 26, 1980, the district court rendered an Opinion and Order resolving the sovereign immunity issue. *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, 502 F.Supp. 120 (S.D.N.Y. 1980). While ruling that Iran had not waived its immunity from prejudgment attachment under the FSIA or the Treaty of

1 Invoking the powers of the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (Supp. III 1979) (IEEPA), President Carter on November 14, 1979 issued Executive Order 12,170, which ordered the blocking of "all property and interests in property of the Government of Iran . . . subject to the jurisdiction of the United States" and authorized the Secretary of the Treasury to promulgate regulations to implement the freeze order. Pursuant to this authority, the Secretary promulgated the Iranian Assets Control Regulations, 31 C.F.R. §§ 535.101-.904 (1979), which among other things granted conditional licenses authorizing suits against Iran, § 535.504, and attachment of Iranian assets, § 535.418.

2 N.Y. Civ. Prac. L. R. § 6211(b) (McKinney 1980) provides that "[a]n order of attachment granted without notice shall provide that within a period not exceed five days after the levy, the plaintiff shall move, on such notice as the court shall direct to the defendant . . . for an order confirming the order of attachment."

3 Although the FSIA was enacted after the Treaty of Amity, § 1609 of the FSIA provides that immunity from attachment and execution is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act." 28 U.S.C. § 1609 (Supp. III 1979).

Amity, the court concluded that the Presidential freeze had "suspended" Iran's immunity from prejudgment attachment. Judge Duffy did not pass upon the plaintiffs' additional argument that Iran had forfeited its immunity by reason of its hostile acts toward the United States. The Government's request for an indefinite stay was denied, with Judge Duffy stating that on balance his decision did not "in any way, impinge on the enormous prerogatives vested in the President" to handle foreign affairs. *Id.* at 133. Having decided the common question presented to him, Judge Duffy referred the cases back to the various district judges for resolution of the non-common issues.[4]

Immediately following this decision, the United States moved on October 6, 1980 for a stay of further district court proceedings pending appellate review. The Government also sought leave to intervene and moved for certification under 28 U.S.C. § 1292(b) (1976) of the court's refusal to grant its request for an indefinite stay. On November 5, 1980, Judge Duffy denied these motions. On November 25, 1980, the Government filed a notice of appeal of the September 26 Opinion and Order, claiming that the denial of its request for a stay was appealable under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Finally, on December 19, 1980, the Government petitioned for a writ of mandamus to compel the district court to stay the proceedings. A panel of this Court on December 23 scheduled briefing on the petition for mandamus and temporarily stayed proceedings in the district court pending its decision on the petition.

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4 Before an attachment may be confirmed, the plaintiff must show "that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff." N. Y. Civ. Prac. L. R. § 6212(a) (McKinney 1980). Section 6201 states that an order of attachment may be granted in a damage action where, *inter alia*, the defendant "is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state" or where the defendant, "with [the] intent to defraud his creditors . . . has assigned, disposed of, encumbered or secreted property or removed it from the state or is about to do any of these acts." N. Y. Civ. Prac. L. R. § 6201 (McKinney 1980).

Recognizing that there was "substantial room for differences of opinion" on the sovereign immunity issue and that immediate appeal could "materially advance the termination of this litigation," Judge Duffy on December 22, 1980 certified four questions to this Court:

1. Did Executive Order No. 12,170 (November 14, 1979), 44 Fed. Reg. 67729, the Treasury Regulations promulgated thereunder and President Carter's subsequent reports to Congress suspend, dissolve or terminate the immunity from pre-judgment attachment that would otherwise be available to defendants under the Foreign Sovereign Immunities Act of 1976 and the Treaty of Amity?

2. If the answer to No. 1 above is yes, does the International Emergency Economic Powers Act (50 U.S.C. §§ 1701, *et seq.*) authorize the suspension, dissolution or termination of defendants' immunity from pre-judgment attachment in the manner that the Court found had occurred here?

3. If the answers to Nos. 1 and 2 above are yes, is the International Emergency Economic Powers Act constitutional as applied?

[4.] Whether sovereign immunity of the defendants under the Foreign Sovereign Immunities Act with respect to pre-judgment attachment has been waived, terminated or suspended by virtue of (a) the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, or (b) the severance of diplomatic relations between the United States and Iran and actions taken by Iran in violation of international law.

Judge Duffy specifically refused to certify whether the lifting of the freeze would terminate the attachments, stating that "[s]uch a contingency is simply not a 'case or controversy' properly before any court at the present time." On January 5,

1981, this Court issued an order permitting interlocutory appeal of the certified questions, granted the Government's motion for an expedited appeal, continued the previously granted stay, and scheduled argument on all points raised by the petition and the appeal.

Subsequent events radically changed the focus and posture of this appeal. On January 19, 1981, President Carter entered into a series of agreements to secure the release of the American hostages.[5] Under the agreements, most claims are to be submitted to binding, non-reviewable arbitration before a Claims Tribunal. Iran agreed to establish a security account which would be initially funded by a deposit of $1 billion in previously frozen funds and securities, and promised to replenish the fund whenever it fell below $500 million, until all awards are paid. In return, the United States promised to "act to bring about the transfer [of Iranian funds and securities held in U.S. banks] within six months." Crucial to the settlement was the promise of the United States to

> terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

To implement these agreements, President Carter issued Executive Orders 12276 through 12285 which, *inter alia,* revoked the previously issued license to attach the frozen assets, nullified

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5 The agreements are comprised of the Declaration of the Government of the Democratic and Popular Republic of Algeria, which sets forth the general principles of the settlement; the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, which sets forth the terms and conditions of claims settlements between the two nations; and several undertakings, a related escrow agreement, and various banking documents.

all post-freeze rights of non-Iranians in the assets, precluded United States citizens from acquiring further rights in the assets, directed those entities holding Iranian funds and securities to transfer them to the Federal Reserve Bank of New York, and required those holding other frozen assets to transfer the property as directed by Iran.[6] On February 24, 1981, President Reagan ratified the terms of the agreement, and issued the following Executive Order concerning claims pending against Iran:

> Section 1. All claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the Tribunal. During the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States, including the courts of any state or any locality thereof, the District of Columbia and Puerto Rico, or in any action commenced in any such court after the effective date of this Order.

Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981). Regulations implementing this order provide that "[u]ntil the Secretary of the Treasury determines that the authority of the United States to order these transfers has been the subject of a definitive legal ruling, the United States Government will not seek to impose civil or criminal sanctions on any party who does not make the transfers required by [the orders and regulations]." 31 C.F.R. § 535.221(b) (1981).

The parties essentially agree that the four certified questions are no longer central to this case, having been supplanted by a

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6 *See* 46 Fed. Reg. 7913, 7915, 7917, 7919, 7921, 7923, 7925, 7927, 7929, and 7931 (1981).

single, overriding question: Were the actions of the President in suspending the lawsuits and nullifying the attachments consistent with constitutional power and any applicable satutory authority? Nevertheless, the Government forcefully argues that the Executive Orders and Treasury Regulations implementing the settlement agreement constitute an intervening change in law which this Court is bound to apply, *see United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801), even in the context of this somewhat outdated interlocutory appeal, *see Bersch* v. *Drexel Firestone, Inc.,* 519 F.2d 974, 994-95 (2d Cir.), *cert. denied,* 423 U.S. 1018 (1975). Of course, essential to the Government's argument is its contention that the settlement agreement is valid and enforceable, an issue which was neither decided in the district court nor briefed in this Court. In so contending, the Government would have us decide at this juncture delicate questions concerning the statutory and constitutional authority of the Executive to make and enforce the Executive Orders and Treasury Regulations here at issue. Although we are mindful of the necessity for a speedy resolution of these questions, we must reject the Government's invitation and remand this case for further development in the district court.

In the first place, the questions we are asked to decide are posed in the abstract; the original dispute which brought this case before us has been swept to the sidelines. To appreciate the degree of attenuation between the original disputes and the legal question now pressed upon us, one need only review the manner in which this case arrived in this Court. These cases were referred to Judge Duffy to decide a preliminary issue (sovereign immunity) in connection with a provisional remedy entered *ex parte.* The only issue decided below, certified to us, and briefed by the parties was whether sovereign immunity stood as a bar to prejudgment attachment of Iran's frozen assets. Since the settlement agreement, many of these parties, including New England Merchants National Bank, have been paid the full amount claimed in their complaints. Others are willing to try their luck before the Claims Tribunal and seek recourse against the United States in the event of a shortfall.

Still other plaintiffs contend that their claims against the defendants fall outside the scope of the agreements and therefore should not be subject to a stay. None of the *ex parte* attachments has been confirmed, and it is quite likely that some will be vacated for failure to comply with the requirements of N. Y. Civ. Prac. L. R. § 6211(b) (McKinney 1980). Under these circumstances, a definitive ruling by this Court on the scope, validity, and effect of the settlement agreement would come perilously close to an advisory opinion. This lack of concreteness, together with the novelty and delicacy of the issues, counsels us to remand this case to the district court so that any challenge to the settlement agreement can be decided in the context of a live controversy, after full briefing and any necessary fact-finding.

Moreover, even if, as the Government suggests, we have that power to decide these issues now, we do not think that that power would be wisely exercised in the present context of this case. *See Singleton* v. *Wulff*, 428 U.S. 106, 120-21 (1976). Ordinarily, "where circumstances have changed between the ruling below and the decision on appeal, the preferred procedure is to remand to give the district court an opportunity to pass on the changed circumstances," unless the new situation "demands one result only." *Korn* v. *Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1972); *accord, Concerned Citizens of Vicksburg* v. *Sills*, 567 F.2d 646, 649-50 (5th Cir. 1978); *see also Singleton* v. *Wulff, supra*, 428 U.S. at 121. Although the United States optimistically contends that this case "demands one result only," the tangle of conflicting factual and legal claims raised in these 96 "common" claims betrays the Government's forecast.

The First Circuit, when confronted with a virtually identical situation involving a post-settlement appeal of a pre-settlement provisional remedy, remanded the case to the district court for reconsideration in light of the intervening events. *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. Feb. 23, 1981); *see also Electronic Data Systems Corp. Iran* v. *Social Security Organization of the Government of Iran*, 610 F.2d 94 (2d Cir. 1979) (remanding

attachment order in light of intervening circumstances, including Embassy takeover and "freeze order"). Similarly, in *United States* v. *Michigan,* 623 F.2d 448 (6th Cir. 1980), an appeal had been taken from a district court order which had ruled that Michigan Indians were not bound by certain state fishing laws, despite Michigan court decisions to the contrary. In the interim, the Secretary of the Interior promulgated comprehensive fishing regulations pursuant to his delegated power to govern Indian affairs. The Sixth Circuit remanded the case to the district court for consideration of the preemptive effect of the new regulations. Finally, in *Welch* v. *Schultz,* 482 F.2d 780, 782-83 (D.C. Cir. 1973), the court remanded a suit challenging a ban on contributions to North Vietnam in light of the subsequent peace agreement with that country. In declining to decide the case, the *Welch* court stated:

> We are not able to measure with any reasonable degree of precision the possible impact of this turn of events upon the quarrel in which the litigants became embroiled. The change in circumstances which has overtaken this appeal may well have seriously modified the controversy which the parties briefed and argued here, or even actually mooted it. . . . By the same token, the basis for decision of any dispute which may have survived that agreement may, at the very least, have taken on an added dimension.
>
> . . . .
>
> In sum, an accurate assessment of the current status of the controversy requires exploration and reappraisal, and any residual problems call for definition and examination afresh on an up-to-date factual record.

Id. at 783 (footnotes omitted).

Like the court in *Chas. T. Main, supra,* we are aware of the need for a prompt judicial determination of the enforceability of the settlement agreement, lest the United States be held in breach of its promise to transfer assets to Iran by July 19, 1981. The district court is instructed to, and undoubtedly will, proceed with expedition. At the same time, however, we cannot

in the name of expediency decide a question which is not properly before us. Were we to do so, we would be engaging in the sort of "almost irresponsibly feverish" review, *New York Times* v. *United States,* 403 U.S. 713, 753 (1971) (Harlan, *J.*, dissenting), which too often can give truth to Justice Holmes' statement, "Great cases like hard cases make bad law." *Northern Securities Co.* v. *United States,* 193 U.S. 197, 400 (1904) (Holmes, *J.*, dissenting).

The petition for mandamus is denied. This Court's stay of proceedings in the district court is continued, with the following exception: The cases are remanded to Judge Duffy with instructions to join the United States as a party in a single case in which the issues raised by the Iranian Agreement and the Presidential Orders are squarely presented and to proceed with confirmation hearings in that case alone. In that manner, the issues raised as to the scope, validity, and effect of the Agreement and Orders can be quickly resolved and the district court's determination returned to this Court for prompt review. Further proceedings in all other actions are stayed until the further order of this Court. This panel will retain jurisdiction.

VAN GRAAFEILAND, *Circuit Judge* (Concurring):

I concur with the majority in all cases except those in which Marine Midland Bank, GTE International, Inc., and Westinghouse Electric are parties. I have not participated in the determination relative to those cases.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1049-1144—September Term, 1980

Docket Nos. 80-6254 et al.

Date Filed: June 15, 1981

THE MARSCHALK COMPANY, INC.,

Plaintiff-Appellee,

—v.—

IRAN NATIONAL AIRLINES CORP. and
THE GOVERNMENT OF IRAN,

Defendant-Appellants,

UNITED STATES OF AMERICA,

Intervenor-Appellant.

Before:

TIMBERS, VAN GRAAFEILAND and MESKILL,
Circuit Judges.

ORDER CERTIFYING QUESTIONS TO THE SUPREME COURT OF THE UNITED STATES

The judges of this panel having encountered questions of law upon which instructions are desired, and in the interest of

proper administration and expedition of judicial business, *see Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), the following questions are hereby certified to the Supreme Court of the United States pursuant to 28 U.S.C. § 1254(3) (1976) and Supreme Court Rule 24.

Statement of Facts

Iran National Airlines Corp. (IRAN AIR), an instrumentality of the Government of Iran licensed to do business in New York, entered into a contract effective August 15, 1978 with the Marschalk Company, Inc. (MARSCHALK), a New York corporation, for the performance of advertising services in the United States. Under the contract, Marschalk was to act as Iran Air's advertising agent in the United States for one year from the date of the contract, and thereafter unless proper notice of cancellation was given. In accordance with its contractual duties, Marschalk created and placed advertisements in print media in various markets in the United States, billing Iran Air for the work when the advertisements were published. After a brief period of punctual payments, Iran Air began to fall behind in its payments to Marschalk. By November 30, 1979, Marschalk had invoiced Iran Air for $46,528.02, no part of which had been paid. Iran Air neither contested the invoices nor objected to Marschalk's performance under the contract.

During the same period, relations between the United States and Iran had worsened. In response to the November 4, 1979 seizure of American hostages, President Carter on November 14, 1979 declared a national emergency and issued Executive Order 12,170, which ordered blocked "all property or interests in property" of Iran within the jurisdiction of the United States and which authorized the Secretary of Treasury to implement the freeze order with appropriate regulations. 44 Fed. Reg. 65,729. Pursuant to this authority, the Secretary issued regulations which blocked the removal or transfer of Iranian assets in the United States except according to the terms of licenses accompanying the freeze order or issued thereunder. 31 C.F.R.

Part 535. Specifically, the regulations provided, "Unless licensed or authorized pursuant to this part any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since the effective date there existed an interest of Iran." 31 C.F.R. § 535.203(e). On November 21, 1979, the Secretary promulgated a regulation stating that "[t]he provisions of this part and any rulings, licenses, authorizations, instructions, orders, or forms issued thereunder may be amended, modified, or revoked at any time." 31 C.F.R. §535.805. On November 26, 1979 the Secretary promulgated a regulation authorizing "judicial proceedings" against Iran with the exception of "the entry of any judgment or of any decree or order of similar or analogus effect." 31 C.F.R. § 535.504(a), (b)(1). On December 19, 1979, the Secretary promulgated a regulation which explained that "[t]he general authorization for judicial proceedings contained in § 535.504(a) included pre-judgment attachments." 31 C.F.R. § 535.418.

On December 28, 1979, Marschalk filed suit in the United States District Court for the Southern District of New York seeking judgment against Iran Air and Iran in the amount of $46,528.02 plus interest and costs. [On the same day], the district court granted, pursuant to N.Y. Civ. Prac. L.R. § 6211(a) (McKinney), an *ex parte* order of attachment against defendant's assets located in several banks. On September 26, 1980, the district court ruled in 96 consolidated cases that Iran's assets were not immune from pre-judgment attachments. *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, 502 F.Supp. 120 (S.D.N.Y. 1980). The cases were then returned to the individual district judges for confirmation pursuant to N.Y. Civ. Prac. L.R. § 6211(b).

Before the *ex parte* attachment in Marschalk could be confirmed, however, President Carter on January 19, 1981 entered into an agreement with Iran to secure the release of the hostages. The initial agreement calls for the establishment of

an Iran-United States Claims Tribunal which, with certain exceptions, will arbitrate all unsettled claims and whose awards will be "final and binding" and "enforceable . . . in the courts of any nations in accordance with its laws." Under the terms of the agreement, the United States is obliged to

> "terminate all legal proceedings in the United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."

To implement the agreement, President Carter issued Executive Orders 12,276 through 12,285, which revoked the licenses permitting attachments of frozen assets, nullified the attachments required under those licenses, and required those holding frozen assets to turn them over to the Federal Reserve Bank for transfer to Iran. On February 24, 1981 President Reagan ratified the January 19, 1981 Executive Orders and ordered the "suspension" of "[a]ll claims which may be presented to the [Tribunal]", stating that "such claims shall have no legal effect in any action now pending in any court of the United States. . . ." 46 Fed. Reg. 14,111 (1981).

The district court found that Marschalk's claim would, under the terms of the agreement, fall within the jurisdiction of the Claims Tribunal. The court declined to suspend the litigation of the claim, however, ruling that the agreement and Executive Orders issued in furtherance thereof were not within the Executive's statutory or constitutional authority, and thus were invalid and unenforceable. Having found that Marschalk had demonstrated likelihood of success on the merits, *see* N.Y. Civ. Prac. L.R. § 6212(a) (McKinney), the district court confirmed the attachment and denied motions to dismiss the suit and vacate the attachments.

Questions Certified

(1) Was the action of the President in suspending claims which may be presented to the Claims Tribunal and in declaring that they shall have no legal effect in the courts of the United States within his statutory and/or constitutional authority?

(2) Was the action of the President in nullifying the attachments acquired on blocked assets and requiring the transfer of those assets to Iran within his statutory and/or constitutional authority?

(3) Did the action of the President in suspending the claims or nullifying the attachments constitute a taking of property for which compensation must be paid?

s/ WILLIAM H. TIMBERS
William H. Timbers

s/ ELLSWORTH A. VAN GRAAFEILAND
Ellsworth A. Van Graafeiland

s/ THOMAS J. MESKILL
Thomas J. Meskill

Filed
Jun 15 1981
United States Court of Appeals
Second Circuit
A. Daniel Fusaro, Clerk

No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership, *Petitioner*,

v.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA, *Respondents*.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OF FORMER HOSTAGE JERRY PLOTKIN AND BRIEF

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No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership, *Petitioner,*

v.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA, *Respondents.*

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OF FORMER HOSTAGE JERRY PLOTKIN

Former Hostage Jerry Plotkin respectfully moves this Court for leave to file a brief "Amicus Curiae" in *Dames & Moore, a Partnership* v. *Donald T. Regan, the Secretary of the Treasury of the United States of America, and the United States of America,* No. 80-2078.

INTEREST OF THE AMICUS CURIAE

Jerry Plotkin is a private American citizen who was in Iran in late 1979 on business in connection with providing technical workers for Iranian construction

projects. In the morning of November 4, 1979, Mr. Plotkin was in the compound of the United States Embassy in Tehran, Iran when the Embassy was overrun and captured. Mr. Plotkin was among a group of American citizens held hostage for over fourteen months.

Mr. Plotkin's and other hostages' release was in part secured by the negotiation and execution of agreements commonly known as the "Algerian Declarations." At approximately the same time as the United States Government entered into the Algerian Declarations, President Jimmy Carter promulgated Executive Order 12283, dated January 19, 1981, entitled "Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere." Both the Algerian Declarations and Executive Order 12283 purport to preclude Jerry Plotkin and all other former hostages from using the courts to seek redress for any wrongs committed which arise out of the Iranian seizure of the American Embassy in Tehran.

UNPRESENTED FACTS AND LAW

Because of the vastly different factual contexts forming the bases for challenges to the constitutionality of Executive Order 12283 and the Algerian Declarations between the former hostages on the one hand, and American businesses with claims against Iran on the other, Jerry Plotkin asks the Court to recognize that its decision may significantly and unfairly affect his ability to pursue legal remedies for the ordeal he suffered while in captivity. Mr. Plotkin, and the other former hostages, have not had the opportunity to fully present the facts and legal contentions regarding the invalidity of the Algerian Declarations and Executive Order 12283. This lack of opportunity is especially

significant because the curtailment of rights suffered by the returned hostages is even more drastic than the significant due process restrictions imposed upon Petitioner Dames & Moore by the actions of President Carter and President Reagan in resolving the "hostage crisis." Because of such Presidential actions, Mr. Plotkin's access to the courts for matters involving his captivity in Iran is totally barred, while Petitioner's access is merely "suspended."

Because of the different factual setting of Petitioner Dames & Moore's claims, the factual and legal contentions of Jerry Plotkin and the other former hostages have not and cannot be presented to this Court by the Petitioner. Moreover, because of the lack of a detailed record regarding the factual and legal contentions of Jerry Plotkin and the other former hostages, a determination of their rights by the Court at this time would be premature.

CONCLUSION

For the foregoing reasons, the motion for leave to file a brief Amicus Curiae of former hostage Jerry Plotkin should be granted.

Dated: June 18, 1981.

Respectfully submitted,

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TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OF FORMER HOSTAGE JERRY PLOTKIN i

INTEREST OF THE AMICUS CURIAE i

UNPRESENTED FACTS OF LAW ii

CONCLUSION iii

AMICUS CURIAE BRIEF OF FORMER HOSTAGE JERRY PLOTKIN 1

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

1. The Rights And Remedies Of The Former Hostages Under The Algerian Declarations And The Executive Orders Differ Substantially From Those Of Petitioner 3

2. The Algerian Declarations And Executive Orders Precludes Judicial Redress For Claims Of Former Hostages 5

3. The Issue Of The Former Hostages' Rights Is Not Before The Court 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

American International Group, Inc. v. *Islamic Republic of Iran*, No. 80-1779 (June 5, 1981) 8

Alabama State Federation of Labor v. *McAvon*, 325 U.S. 450 (1945) 9

Allen Bradley Local No. 1111, et al. v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (1942) ... 9

Tennessee Pub. Co. v. *American National Bank, et al.*, 299 U.S. 18 (1936) 9

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AMICUS CURIAE BRIEF OF FORMER HOSTAGE JERRY PLOTKIN

INTEREST OF THE AMICUS CURIAE

This Amicus Curiae Brief arises out of dramatic events of national and historic significance. Amicus Curiae Jerry Plotkin is a private American citizen who was in Iran in late 1979 on business in connection with providing technical workers for Iranian construction projects. Mr. Plotkin was within the compound of the United States' Embassy in Tehran, Iran, the morning of November 4, 1979 when that Embassy was overrun and captured. Mr. Plotkin was among a group of American citizens held hostage for over fourteen months in the compound of the Embassy and at other locations in Iran, and was a member of the group of

fifty-two hostages returned to the United States shortly after the expiration of the term of President Jimmy Carter.

The release of the fifty-two former hostages was in part secured by the negotiation and execution of certain agreements by Deputy Secretary of State Warren Christopher on behalf of the United States Government, which are collectively and commonly known as the "Algerian Declarations." The specific agreements pertinent to Mr. Plotkin for the purposes of this action are the Declaration of the Government of the Democratic and Popular Republic of Algeria (hereinafter "Algerian Declaration I") and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (hereinafter "Algerian Declaration II").

At approximately the same time the United States Government entered into the Algerian Declarations, President Carter promulgated Executive Order 12283 entitled "Non-Prosecution of Claims of Hostages and For Actions at the United States Embassy and Elsewhere" (hereinafter "Executive Order 12283 re Claims of Hostages"). Both the Algerian Declarations and the Executive Order 12283 re Claims of Hostages purport to preclude Mr. Plotkin and all other former Iran hostages from seeking redress in a judicial forum for wrongs done to them while held captive in Iran.

SUMMARY OF ARGUMENT

Amicus Curiae Jerry Plotkin was one of fifty-two American hostages seized November 4, 1979 at the

American Embassy in Tehran, Iran. The right to seek redress of his claims against Iran are purportedly determined by the Algerian Declarations and Executive Order 12283.

Unlike Petitioner, Dames & Moore, the rights of Amicus Curiae Plotkin to prosecute his claim in a judicial forum against Iran in connection with his capture and detention have been totally eliminated. In contrast, certain classes of commercial claimants against Iran merely have their claims "suspended," and further have access to an alternative forum, the Iran-United States Claims Tribunal.

Mr. Plotkin respectfully urges the Court in determining the rights of the Petitioner to restrict its opinion to the precise facts presented and preserve the opportunity of Mr. Plotkin and other returned hostages to assert their claims at a further date—claims which spring from an unprecedented factual context totally distinct from that of Petitioner.

ARGUMENT

1. The Rights And Remedies Of The Former Hostages Under The Algerian Declarations And The Executive Orders Differ Substantially From Those Of Petitioner.

On or about June 10, 1981, petitioner Dames & Moore submitted to the United States Supreme Court a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit before Judgment. Petitioner Dames & Moore seeks, in part, to determine whether the President of the United States has statutory or constitutional authority to settle or abrogate claims of American citizens against foreign states and their agencies. Petitioner Dames &

Moore further seeks to have the Supreme Court of the United States determine whether such an exercise of Presidential power, if valid, constitutes an unconstitutional taking of property under the Fifth Amendment to the Constitution of the United States.

Resolution of the above questions necessarily invites this Court to determine certain issues concerning the validity of the Algerian Declarations and various relevant Executive Orders. Amicus Curiae Jerry Plotkin supports the contentions of petitioner Dames & Moore that the Algerian Declarations and related Executive Orders constitute an invalid exercise of Presidential power and are therefore null and void. Mr. Plotkin will not burden the Court at this juncture with further citation of authority supporting the Petitioner's assertions. However, Mr. Plotkin respectfully requests this Court to recognize that the decision which it renders on the questions presented by Petitioner Dames & Moore may have significant impact on the ability of Mr. Plotkin, and other returned hostages who shared his ordeal, to pursue legal remedies to which they are entitled pursuant to the provisions, *inter alia,* of Article III of the United States Constitution and the Fifth Amendment to the United States Constitution.

Because of the circumstances of time and history, Mr. Plotkin, and all other returned hostages, have not yet had opportunity to fully present their legal contentions concerning the invalidity of the Algerian Declarations and Executive Order 12283 re Claims of Hostages as specifically applied to Mr. Plotkin and others with similar claims. The divestment of rights of the returned hostages under the Algerian Declarations and Executive Order 12283 re Claims of Hostages constitute an even more drastic curtailment of rights

of due process than the very significant violations imposed upon Petitioner as a result of the Presidential actions. Thus, Mr. Plotkin, respectfully directs the attention of this Court to certain significant distinctions between himself and Petitioner in the hope that any decision rendered by this Court in this case will not unduly restrict the unique and distinguishable rights of the returned hostages to pursue claims arising out of the seizure of the American Embassy in Tehran.

2. The Algerian Declarations And Executive Orders Precludes Judicial Redress For Claims Of Former Hostages.

Article II of the Algerian Declaration II states in pertinent part that "[a]n international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran. . . ." However, Article II explicitly excepts from its provision all claims described in Paragraph 11 of the Algerian Declaration I. Paragraph 11 states, in pertinent part, that the United States shall "promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter *bar* and *preclude* the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events, . . . related to (A) the seizure of the fifty-two United States nationals on November 4, 1979, (B) their subsequent detention; (C) injury to United States property or property of the United States Nationals within the United States Embassy compound in Tehran after November 3, 1979. . . ."

In short, Amicus Curiae Jerry Plotkin and other former hostages are purportedly *absolutely barred*

from commencing or pursuing any claim related to the seizure of hostages. Indeed, Executive Order 12283 re Claims of Hostages authorizes the Secretary of the Treasury to promulgate regulations providing for an even more severe prohibition against prosecution of claims by hostages, inasmuch as the Executive Order would prohibit any person subject to the jurisdiction of the United States from prosecuting "in any court within the United States *or elsewhere* any claim against the Government of Iran" arising out of the American Embassy seizure in Tehran. [Emphasis added]. Under Executive Order 12283 re Claims of Hostages, the Treasury Secretary is further empowered to order the "*termination* of any previously instituted judicial proceedings and may further *prohibit* enforcement of any judicial order issued in the course" of any proceedings concerning a claim based on the seizure of the United States Embassy in Iran. [Emphasis added].

In contrast, certain classes of commercial litigants against Iran enjoy the benefits of access to the Iran-United States Claims Tribunal under Article II of the Algerian Declaration II and, by virtue of Presidential Executive Order 12294, dated February 24, 1981, executed by President Ronald Reagan, suffer merely a "suspension" of their claims against Iran, rather than absolute termination. Executive Order 12294 provides further that those claimants entitled to present claims to the Iran-United States Claims Tribunal may commence an action in a court of competent jurisdiction in the United States "for the purpose of tolling the period of limitations for commencement of such action." Executive Order 12294 of February 24, 1981, Section 1. Furthermore, in the event

that the Iran-United States Claims Tribunal determines that it does not have jurisdiction over a given claim, the suspension provided in Executive Order 12294 is terminated and the claimant is entitled to revive its action in the judicial forum where the action was initially commenced. Executive Order 12294 of February 24, 1981, Section 3. Finally, if any such claimant is successful in obtaining judgment in the Iran-United States Claims Tribunal, but unsuccessful in collecting payment of the full amount awarded by such Tribunal, the claim is not discharged and may be pursued in the appropriate judicial forum in the United States or elsewhere. Executive Order 12294 of February 24, 1981, Section 4.

Article I of the Algerian Declaration II provides in pertinent part that "Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this agreement shall be submitted to binding third party arbitration. . . ." In contrast, no such opportunity for settlement or arbitration is provided to Amicus Curiae Jerry Plotkin or any of the other former hostages similarly situated.

In sum, the severely restricted right of Mr. Plotkin to pursue legal redress stands in marked contrast to rights granted to certain classes of commercial claimants under the Algerian Declarations and Executive Orders. The significance of such vital distinctions has not been lost on the Circuit Courts of Appeal which have considered the issue of the President's power to enter into the Algerian Declarations. For example, in sustaining the President's inherent power to enter into such agreements with sovereign nations, the Court

of Appeals for the District of Columbia stated in *American International Group, Inc.* v. *Islamic Republic of Iran,* No. 80-1779 (June 5, 1981):

> "Our inquiry, then, is whether the President has the power to suspend the claims of Americans against foreign sovereigns through an executive agreement modifying substantive law and entered into without the advice and consent of the Senate or other Congressional endorsements. Bearing on this decision are two particulars of the Presidential action with respect to the claims against Iran: (1) the Executive asks only their *suspension,* not their cancellation; and (2) the Executive has provided an *alternative forum capable of providing meaningful relief.*" (Typewritten opinion at Page 27). [Emphasis added].

No such forum has been afforded to Mr. Plotkin.[1]

3. The Issue Of The Former Hostages' Rights Is Not Before The Court

Amicus Curiae Jerry Plotkin emphasizes that the benefits of due process and access to a judicial for m of choice should be open to all claimants against the Government of Iran, whether they be Petitioner herein, other commercial claimants or other returned hostages. Thus, in accordance with the arguments by Petitioners herein, the Algerian Declarations and pertinent Executive Orders should be invalidated by this Court.

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[1] Amicus Curiae Plotkin is mindful of the Hostage Compensation Commission established by Executive Order 12285 of January 19, 1981. However, that Commission is merely empowered to "study and analyze" and to "make recommendations" regarding legislative enactment of financial compensation to categories of United States nationals held hostage. The Commission is neither obligated nor empowered to ensure due process rights to the former hostages.

However, in the event that this Court decides adversely to Petitioner on any issue or portions of issues presented herein, Mr. Plotkin asks only that his particular and distinct rights against the Government of Iran not be consumed by the language of any possible adverse decision on the specific claims presented by Petitioner.

Long followed practice mandates that this Court not reach the question of the constitutionality of the Algerian Declarations or of Executive Order 12283 re Claims of Hostages as they affect Amicus Curiae Jerry Plotkin and other returned hostages. This Court does not "decide abstract, hypothetical or contingent questions" or "decide any constitutional question in advance of the necessity for its decision" or "formulate a rule of constitutional law broader than is required by the precise facts to which it is applied," or "decide any constitutional question except with reference to the particular facts to which it is to be applied." *Alabama State Federation of Labor* v. *McAvon*, 325 U.S. 450, 461 (1945). *See, also, Allen Bradley Local No. 1111, et al.* v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 824 (1942); *Tennessee Pub. Co.* v. *American National Bank, et al.*, 299 U.S. 18 (1936). Thus, because the issues presented by this case involve only the rights of commercial litigants, the Court's opinion should not seek to determine the former hostages' rights.

CONCLUSION

For all of the foregoing reasons it is respectfully requested by Amicus Curiae Jerry Plotkin that this Court take cognizance of the above-described distinctions between Amicus Curiae and Petitioner in rendering its decision in the within action.

Dated: June 18, 1981.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE AND BRIEF, *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER'S RIGHT TO COMPENSATION

Plaintiffs listed in Appendix A annexed hereto ("*amici*") respectfully move this Court for leave to file the accompanying brief in this case as *amici curiae* supporting Dames & Moore's

right to compensation for the taking of its claims and the nullification of its attachments against Iranian property.

There are approximately 150 cases filed in the United States District Court for the Southern District of New York against Iran, its agencies, instrumentalities and controlled entities, seeking nearly $2 billion in damages and other relief. The largest portion of the financial assets that must be transferred pursuant to the Iran-U.S. Settlement Agreement by July 19, 1981 are held by domestic banking institutions in the Southern District of New York; most, if not all, of these assets are subject to attachments and/or injunctions. As a result, the importance the 150 cases bear to the issues presented in this action cannot be overstated. Indeed, the United States noted the significance of the New York litigation in the present situation in its memorandum in support of Dames & Moore's petition for a writ of certiorari before judgment.*

The *amici* are plaintiffs in 42 of the 150 actions in the Southern District of New York seeking damages aggregating in excess of $600 million.** In each of these actions, the *amici* have obtained orders of attachment against Iranian property located in the Southern District. The *amici* represent, therefore, one of the largest groups of claimants in the country.

At the time the Iran-U.S. Settlement Agreement were entered into on January 19, 1981, 96 of the 150 cases involving Iran pending in the United States District Court for the Southern District of New York were consolidated and on appeal to the United States Court of Appeals for the Second Circuit for the purpose of deciding certain common issues of law. In view of the changed circumstances resulting from the Iran-U.S. Settlement Agreement, the Second Circuit, on April 9, 1981, remanded the 96 cases with instructions that the district court select a test case and "join the United States as a party in [that]

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* Page 8 of the United States' "Memorandum for the Respondents" filed June 10, 1981 in this action.

** Also joining in this motion are plaintiffs in two actions in the United States District Courts for the District of Maryland and the Western District of Virginia, wherein attachments were also obtained against Iranian property.

single case in which the issues raised by the Iranian Agreement and the Presidential Orders are squarely presented." *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, Nos. 80-6254-6349 and related cases, slip op. at 2463 (2d Cir. Apr. 9, 1981).

On May 28, 1981, pursuant to the instructions from the Second Circuit, the Hon. Kevin T. Duffy selected a test case, *Marschalk Co., Inc. v. Iran National Airlines Corp.*, 79 Civ. 7035, and joined the United States as a party. On June 5, 1981, a hearing was held at which the Iranian Government, the United States and Marschalk argued fully the constitutional issues raised by the Iran-U.S. Settlement Agreement in the context of a single case. On June 11, 1981, the same day on which this Court granted certiorari in the instant case, Judge Duffy, in an 89-page opinion, held that the President did not possess the statutory or constitutional authority to suspend lawsuits against Iran and to vacate attachments and injunctions against Iranian property. Judge Duffy also held, in the alternative, that if the President did have statutory or constitutional authority to exchange United States nationals' claims and security for the release of the hostages, his actions nevertheless constituted a taking which requires compensation under the Constitution. Judge Duffy further reasoned that this taking was also unconstitutional because he found that claimants have no Tucker Act remedy due to the treaty exclusion provision, section 1502 of Title 28, United States Code.*

Five days after Judge Duffy's decision, on June 15, 1981, the Second Circuit, upon motion by the New York garnishee banks holding the bulk of Iranian financial assets in this country,

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* The United States stated, in its memorandum of June 10, 1981 in support of Dames & Moore's petition for a writ of certiorari, that "if the Second Circuit or Southern District should nevertheless conclude that the President was without authority in some respects to enter into and implement the Agreement with Iran, the government would intend to seek immediate review in this Court in order that bank-held assets would be transferred by July 19." Memorandum for the Respondents at 9, n.*. Although Judge Duffy rendered a decision against the United States on the next day, June 11, 1981, the United States, despite its representations to the contrary, has not taken any steps to have this Court review that significant decision.

certified to this Court, pursuant to section 1254(3) of Title 28, United States Code, the following questions in connection with the test case, *Marschalk Co., Inc.*, chosen in the consolidated proceedings in New York:

> 1. Was the action of the President in suspending claims which may be presented to the Claims Tribunal and in declaring that they shall have no legal effect in the courts of the United States within his statutory and/or constitutional authority?
>
> 2. Was the action of the President in nullifying the attachments acquired on blocked assets and requiring the transfer of those assets to Iran within his statutory and/or constitutional authority?
>
> 3. Did the action of the President in suspending the claims or nullifying the attachments constitute a taking of property for which compensation must be paid?

The questions certified are substantially similar to those presented in Dames & Moore's petition for a writ of certiorari.

The *amici's* accompanying brief argues that the President's actions purporting to suspend claims of United States nationals and nullify attachments against Iranian property constitute a Fifth Amendment taking requiring compensation. The *amici* assert that this Court should now determine whether a Tucker Act remedy is available to them. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). The *amici* argue, contrary to the holding of Judge Duffy, that they do have a Tucker Act remedy and are not barred from the Court of Claims by section 1502 of Title 28, United States Code. Should this Court determine that the *amici* do not have a Tucker Act remedy, the *amici* request this Court to delay implementation of the Iran-U.S. Settlement Agreement until the United States provides a mechanism for compensation.

Although numerous *amici* will seek to file briefs with this Court, most of these *amici* will be concerned with the issue of the President's statutory or constitutional authority to suspend claims and nullify attachments—not with the issue of compen-

sation. In the proceedings before Judge Duffy, Baker & McKenzie, on behalf of its clients and 25 other law firms representing plaintiffs in 32 actions in the Southern District of New York, briefed fully the compensation issue raised by the Iran-U.S. Settlement Agreement. With the exception of his conclusion as to the availability of the Tucker Act remedy, Judge Duffy's reasoning substantially followed the position taken in the Baker & McKenzie compensation brief.

As a practical matter, the *amici* may have no other way to protect their interests than to participate in this case as *amici curiae*. The *amici* believe the Court's decision in this action may be dispositive of issues common to all of the Iranian cases—including the compensation issue. The *amici's* participation as *amici curiae* in *Dames & Moore* would not impede the progress of the case and would provide the Court with the opportunity to consider fully the compensation issue raised by the Iran-U.S. Settlement Agreement. The United States and Bank Markazi have consented to the filing of the accompanying brief. Dames & Moore, the Government of Iran and the Atomic Energy Organization of Iran have declined to consent.

Accordingly, it is respectfully requested that this Court grant leave to file the accompanying brief as *amicus curiae*.

Dated: June 19, 1981

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF RIGHT TO COMPENSATION

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	xi
QUESTION PRESENTED	1
INTEREST OF THE *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
The Fifth Amendment Requires That The United States Compensate The *Amici Curiae* For The Taking Of Their Property Interests	5
A. The Orders Of Attachment And The Claims Of The *Amici Curiae* Constitute Private Property Within The Meaning Of The Fifth Amendment	6
1. Orders Of Attachment Constitute Compensable Property Interests	6
2. The Fact That The Attachments Of The *Amici Curiae* Were Obtained After Issuance Of A General License Authorizing Judicial Proceedings Does Not Adversely Affect Their Status As Compensable Property Interests	7
(a) Since neither the IEEPA nor the Constitution grants the President authority to issue "revocable licenses" granting or denying, by executive fiat, the right of the *amici curiae* to sue in United States courts, the issuance of a "revocable license" authorizing the attachment was unnecessary	8
(b) Even if the President has constitutional or statutory authority to issue a "revocable license" granting the *amici curiae* access to United States courts,	

PRECEDING PAGE WAS BLANK

PAGE

any attachment obtained pursuant to such license cannot be vacated without provision for compensation 11

3. The *Amici Curiae's* Claims Constitute Compensable Property Interests 12

B. The Purported Suspension of the *Amici Curiae's* Claims and Vacatur Of Their Attachments Constitute A Compensable "Taking" Of Private Property 15

C. Since The Government Has Taken Property Of The *Amici Curiae* For A Public Purpose, The *Amici Curiae* Are Entitled To Just Compensation, Which The *Amici Curiae* Have Not Received. The Issue of Compensation Is Therefore Ripe For Adjudication By This Court 21

D. This Court Should Hold That The Court Of Claims Has Jurisdiction To Determine Claims For Compensation Brought By The *Amici Curiae* Who Have Suffered Losses 27

CONCLUSION 30

APPENDIX A 1a

PAGE

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases

Acton v. United States, 401 F.2d 896 (9th Cir. 1968), *cert. denied*, 395 U.S. 945 (1969) 13,14
Almota Farmers Elevator and Warehouse Co. v. United States, 409 U.S. 470 (1973) 6
American International Group, Inc. v. Iran, Nos. 80-1779, 80-1891 (D.C. Cir. June 5, 1981) 10n,23,26n
Aris Gloves, Inc. v. United States, 420 F.2d 1386 (Ct. Cl. 1970) 17
Armstrong v. United States, 364 U.S. 40 (1960) 7
Avramova v. United States, 354 F. Supp. 420 (S.D.N.Y. 1973) 20n

Behring International, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 396 (D.N.J. 1979) 6n
Behring International Inc. v. Miller, No. 80-2864 (D.N.J. Dec. 24, 1980) 7,24
Brownell v. National City Bank, 131 F. Supp. 60 (S.D.N.Y. 1955) 12

Chas T. Main International Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir. May 22, 1981) 23n
Chase Manhattan Bank v. United China Syndicate, 180 F. Supp. 848 (S.D.N.Y. 1960) 9n

Eastern Extension, Australasia & China Telegraph Co. v. United States, 251 U.S. 355 (1920) 28n
Electronic Data Systems Corp. Iran v. Social Security Organization of Iran, No. CA 3-79-0218-F (N.D. Tex. Feb. 12, 1981) 10
Electronic Data Systems Corp. Iran v. Social Security Organization of Iran, No. CA 3-79-0218-F (N.D. Tex. June 7, 1981) 10,20n

Gray v. United States, 21 Ct. Cl. 340 (1886) 15,17
Guessefeldt v. McGrath, 342 U.S. 308 (1952) 9n

PAGE

Hughes Aircraft Co. v. United States, 534 F.2d. 889 (Ct. Cl. 1976) 29
Hurley v. Kincaid, 285 U.S. 95 (1932) 27

Isthmian Airways, Inc. v. United States, 94 Ct. Cl. 598 (1941) 13,14

Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) 7
Kuerschner & Rauchwarenfabrik, A.G. v. New York Trust Co., 126 F. Supp. 684 (S.D.N.Y. 1954) 9n

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) 7
Lynch v. United States, 292 U.S. 571 (1934) 7,15

Marschalk Co., Inc. v. Iran National Airlines Corp., 79 Civ. 7035 (S.D.N.Y. June 11, 1981) 3,4,6,7-9,11,12,13n,15-16,20-21,27
Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) 7

Narenji v. Civiletti, 481 F. Supp. 1132 (D.D.C.), *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied sub nom. Confederation of Iranian Students v. Civiletti*, 446 U.S. 957 (1980) .. 10n
National Airmotive Corp. v. Iran, 499 F. Supp. 401 (D.D.C. 1980) 10,15,24
New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., 502 F. Supp. 120 (S.D.N.Y. 1980) 5n,6n,11n,19n
New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., 508 F. Supp. 49 (S.D.N.Y. 1980) 7,24
New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., No. 80-6254 (2d. Cir. Apr. 9, 1981) 3n,16n
New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 79 Civ. 6380 (S.D.N.Y. Apr. 15, 1981) 2

Orvis v. Brownell, 345 U.S. 183 (1953) 14

PAGE

Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980) 6

Reading & Bates Drilling Co. v. National Iranian Oil Co., 79 Civ. 6034 (S.D.N.Y. Nov. 29, 1979) 5n

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 7,21,25,26n,27

Reid v. Covert, 354 U.S. 1 (1957) 15,16

Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) 10

Security Pacific Nat'l Bank v. Iran, No. CV 79-4661-RJK (Gx) (C.D. Cal. Apr. 30, 1981) 6n

Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955) 15,20n

S.N.T. Fratelli Gondrand v. United States, 166 Ct. Cl. 473 (1964) 29

Societe Anonyme Des Ateliers Brille Freres v. United States, 160 Ct. Cl. 192 (1963) 28-29

Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951) . 15

Stringer v. United States, 471 F.2d. 381 (5th Cir.) *cert. denied*, 412 U.S. 943 (1973) 26-27

Swift & Company Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684 (1950) 23n

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 15

United States v. Dow, 357 U.S. 17 (1958) 27

United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955) 20n

United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) 8

United States v. Northern Pacific Ry. Co., 256 U.S. 51 (1921) 15

United States v. Old Settlers, 148 U.S. 427 (1893) 28-29

United States v. Pink, 315 U.S. 203 (1942) 19,20

United States v. Reynolds, 397 U.S. 14 (1970) 21

United States v. Smoot Sand and Gravel Corp., 248 F.2d 822 (4th Cir. 1957) 11

United States v. Weld, 127 U.S. 51 (1887) 28-29

United States v. Willow River Power Co., 324 U.S. 499 (1945) 6,19

PAGE

Vishipco Line v. Chase Manhattan Bank, No. 77-1251 (S.D.N.Y. Nov. 3, 1978) 9n

Williams v. Heard, 140 U.S. 529 (1890) 21

Worthy v. Herter, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959) 10n

Constitution, Statutes and Regulations

Const. Amend. V 5-6,16-20,24

22 U.S.C. § 1732 ..... 10n
28 U.S.C. § 1330 4,10
28 U.S.C. § 1332 4
28 U.S.C. §§ 1491-1506 5,27
28 U.S.C. § 1502 27-30
28 U.S.C. §§ 1602-1611 ..... 4,10,19n
28 U.S.C. § 1610 10
50 U.S.C. App. § 5(b) 8
50 U.S.C. App. § 9 ..... 9n
50 U.S.C. App. § 34 ..... 9n
50 U.S.C. §§ 1702-1706 4

31 C.F.R. Pt. 535 ..... 2n

N.Y. Civ. Prac. L. art. 62 ..... 5n

Other Authority

Declaration of the Government of the Democratic and Popular Government of Algeria 22

Declaration of the Government of the Democratic and Popular Government of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran 22,24-25

Exec. Order No. 12279, 46 Fed. Reg. 7919 (1981) 2n

Exec. Order No. 12294, 46 Fed. Reg. 14111 (1981) 2n,16

	PAGE
H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., *reprinted in* [1976] Code Cong. & Ad. News 6604	10n
H.R. Rep. No. 95-459, 95th Cong., 1st Sess. (1977) ...	8
S. Rep. No. 95-466, 95th Cong., 1st Sess. (1977)	9
Blocking Iranian Property, Message to Congress Reporting on U.S. Action, 15 Weekly Comp. Pres. Docs. 2118 (Nov. 14, 1979)	12n
Restatement (Second) of the Foreign Relations Law of the United States (1965)	18
L. Henkin, *Foreign Affairs and the Constitution* (1972)	15
Dean, *Amending The Treaty Power*, 6 Stanford L. Rev. 589 (1954)	20
Comment, *The Blocked Chinese Assets-United States Claims Problem: The Lump Sum Settlement Solution*, 3 Fordham Int'l L.J. 51 (1979-1980)	20n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a Partnership,

Petitioner,

—against—

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents.

ON CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RIGHT TO COMPENSATION

QUESTION PRESENTED

Do the actions of the President in suspending the commercial claims and nullifying the attachments of claimants against Iran and its controlled entities constitute a taking of property which is constitutional only if just compensation is paid in accordance with the Fifth Amendment?

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are corporations or other entities that have commercial claims against the Government of Iran, its agencies, instrumentalities and other controlled entities ("Iran"). The *amici curiae* have filed lawsuits against Iran in various federal district courts, and most of them have obtained prejudgment attachments or other interlocutory relief securing the payment of their claims.

Most of the *amici* are presently parties to the proceedings which consolidate 96 actions in the United States District Court for the Southern District of New York, *sub nom. New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, 79 Civ. 6380.

In accordance with the Iran-U.S. Settlement Agreement[1] entered into on January 19, 1981, and by subsequent executive orders and regulations, the President has purported to suspend jurisdiction of United States courts with regard to claims of United States nationals (such as the *amici*) against Iran and to order all claimants to submit their claims to an international arbitral tribunal.[2] These orders oust the *amici* from their United States forum, require them to arbitrate their claims against Iran in an international setting and deprive them of the security which they have obtained in this country.

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[1] The "Iran-U.S. Settlement Agreement" includes two declarations of the Government of Algeria, *reprinted at* App. 21-35, by which the United States and the Islamic Republic of Iran settled the hostage crisis.

[2] Exec. Order No. 12294, 46 Fed. Reg. 14111 (1981), and Section 535.222 of the Iranian Assets Control Regulations provide for the suspension of pending lawsuits against Iran. As the Executive Order states:

> Section 1. All claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II of the [settlement] Declaration . . . and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the Tribunal.

Exec. Order No. 12279, 46 Fed. Reg. 7919 (1981), and Sections 535.218(a) and 535.213(a) of the Iranian Assets Control Regulations (31 C.F.R. Part 535) provide for the vacating of all attachments against Iranian property and the transfer of the attached funds to the Federal Reserve Bank of New York "as fiscal agent of the U.S., to be held or transferred as directed by the Secretary of the Treasury." 31 C.F.R. § 535.213(a).

While petitioner Dames & Moore and other parties will address numerous issues raised by the Iran-U.S. Settlement Agreement, this brief addresses only the issue of the right of litigants in United States courts to compensation under the Fifth Amendment. The *amici* have extensively briefed this issue in both the United States Court of Appeals for the Second Circuit and the District Court for the Southern District of New York. Indeed, the District Court, in *Marschalk Co., Inc. v. Iran National Airlines Corp.*, 79 Civ. 7035 (S.D.N.Y. June 11, 1981),[3] substantially upheld the position put forth by the *amici curiae*. The compensation issue is a crucial one in the overall context of the Iranian litigation throughout this country. This Court's determination on the compensation issue clearly will affect the rights of the *amici* who are in a position similar to that of petitioner.

SUMMARY OF ARGUMENT

The *amici curiae* have asserted claims against Iran and obtained valid orders of attachment against Iranian assets in the United States. These claims and attachments constitute valuable property rights, which the United States has purported to nullify. Valid attachments cannot be taken by Executive fiat without just compensation in accordance with the Fifth Amendment. The claims in connection with which the attachments

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[3] In the United States District Court for the Southern District of New York, 96 cases were consolidated for the purpose of deciding certain common issues of law. On appeal, the Court of Appeals for the Second Circuit directed the district court to choose a test case in which the constitutional issues now before this Court would be "squarely presented." New England Merchants National Bank v. Iran Power Generation and Transmission Co., Nos. 80-6254-6349 and related cases, slip op. at 2463 (2d Cir. Apr. 9, 1981). The test case chosen by the District Court was the *Marschalk* action and an opinion was issued in that case holding that the President had acted unconstitutionally. Marschalk Co., Inc. v. Iran National Airlines Corp., 79 Civ. 7035 (S.D.N.Y. June 11, 1981).

were obtained belong to the *amici curiae*, not the Government.[4]

Since the passage of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1602-1611 ("FSIA"), litigants with commercial claims against foreign states are no longer at the mercy of the Executive. Such claims—cognizable under the FSIA—can in certain cases be validly secured by prejudgment attachments, and can in all cases be reduced to an enforceable judgment. The enactment of the FSIA severely curtailed the Executive's ability to treat foreign claims as property belonging to the United States. The Executive cannot control access to a judicial forum for the hearing and determination of such claims.

The contention that the attachments were issued under a "revocable" license does not destroy any right of the *amici curiae* to just compensation. The *amici curiae* never required the Executive's "permission" to sue Iranian defendants and obtain attachments. The provisions of the FSIA guarantee the *amici* those rights and the International Emergency Economic Powers Act, 50 U.S.C. §§ 1702-1706 ("IEEPA"), did not abrogate them in cases of "national emergency." To hold otherwise would permit the Executive absolute discretion to regulate congressionally granted judicial remedies. In addition, even if the license permitting attachments was a predicate to the obtaining of an attachment, the "revocable" nature of that license cannot operate to divest any *amici* of a property right acquired through, and in reliance upon, that license.

Finally, the issue of whether there exists a constitutional impediment to implementation of the Iran-U.S. Settlement

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[4] This brief will focus primarily on the issue of whether the vacatur of the orders of attachment gives rise to a compensation claim under the Fifth Amendment. By so arguing, however, the *amici* do not concede that the ousting of United States citizens from the courts does not in and of itself constitute an unlawful taking. The arguments in support of compensation apply equally to the Government's action in relegating the *amici* to a foreign arbitral tribunal. "When the right to enforce a contract in the United States courts is taken away or materially lessened, the contract and the rights thereunder are taken within the meaning of the Constitution." Marschalk Co., Inc. v. Iran National Airlines Corp., 79 Civ. 7035, slip op. at 61 (S.D.N.Y. June 11, 1981).

Agreement, because of the absence of a provision for compensation, is ripe for adjudication and the Court of Claims has jurisdiction to hear subsequent suits by the *amici curiae* under the Tucker Act, 28 U.S.C. § 1491-1506, seeking compensation for losses sustained as a result of the executive orders implementing the Iran-U.S. Settlement Agreement.

ARGUMENT

The Fifth Amendment Requires That The United States Compensate The *Amici Curiae* For The Taking Of Their Property Interests

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

In order to invoke the Fifth Amendment, it is therefore necessary to establish that (1) there are private property interests, (2) which were taken for public use, (3) without just compensation. All three elements are present in the case at bar.

The cases of the *amici curiae* are unique because most of their claims are—primarily due to the recent enactment of the FSIA—judicially cognizable in the United States courts, and are fully secured by valid attachments.[5] As explained below, the *amici*

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[5] All *amici curiae* have valid orders of attachment. Some of these orders of attachment, obtained *ex parte*, are subject to a showing by those *amici* that they have a probability of success on the merits. *See* Marschalk Co., Inc., slip op. at 66; New England Merchants National Bank v. Iran Power Generation and Transmission Co., 502 F. Supp. 120, 133 (S.D.N.Y. 1980). Other *amici curiae* obtained orders of attachment on notice, *e.g.*, Reading & Bates Drilling Co. v. National Iranian Oil Co., 79 Civ. 6034 (S.D.N.Y. Nov. 29, 1979), which are fully confirmed under New York law. *See* N.Y. Civ. Prac. L. art. 62. In either case, all judges granting such orders of attachment to the *amici curiae* have held that the defendants are not entitled to assert sovereign immunity.

curiae are protected by the Fifth Amendment in the instant situation, and the Court of Claims should be declared to be open to those *amici curiae* injured by the implementation of the Iran-U.S. Settlement Agreement.

A. The Orders Of Attachment and the Claims of the Amici Curiae *Constitute Private Property Within The Meaning Of The Fifth Amendment*

1. Orders Of Attachment Constitute Compensable Property Interests

As the district court held in *Marschalk Co., Inc.*, slip op. at 75-77, the orders of attachment obtained by the *amici curiae* constitute "property" within the meaning of the Fifth Amendment. "Property" under the Fifth Amendment is an all-embracing term. *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980). Both tangible and intangible rights, such as a lessee's expectancy that his lease will be renewed, are included within the ban on taking without just compensation. *Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973); *see United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

Other types of security interests analogous to prejudgment orders of attachment have been held to constitute "private property." The Supreme Court has held, for example, that an amendment to the Bankruptcy Act adversely affecting certain incidents of a mortgagee's lien was unconstitutional as a taking of private property without just compensation, despite the

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albeit on different grounds. *Compare* New England Merchants, 502 F. Supp. 120, *with* Behring International, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 396 (D.N.J. 1979). The situation of these *amici curiae* is therefore in sharp contrast to the plaintiffs in Security Pacific National Bank v. Government of Iran, No. CV 79-4661-RJK (GX) (C.D. Cal. Apr. 30, 1981). The court held in those consolidated cases that plaintiffs did not have valid attachments and therefore it was "unnecessary" to consider "the difficult issue of whether a Presidential settlement such as this would override valid attachments obtained pursuant to the FSIA." *Id.*, slip op. at n.24.

existence of an economic emergency. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935); *see also Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). The taking of a materialman's lien has similarly been held to give rise to a compensable claim. *Armstrong v. United States*, 364 U.S. 40 (1960) (lien of materialmen who had provided materials to a contractor building ships for Government constituted compensable property interest despite default of contractor and passage of title to ships to Government). In *Armstrong*, it was possible that the property underlying the materialmen's lien would eventually be owned by the Government. That fact, however, did not stop the lien from adhering, *id.* at 42, and did not affect its status as compensable property. *Marschalk Co., Inc.*, slip op. at 77; *see also Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *Lynch v. United States*, 292 U.S. 571 (1934); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

Indeed, aside from the holding in *Marschalk Co., Inc.*, another Iranian case also held that the use of the attached assets to settle the United States' differences with Iran requires compensation. "Even if said funds were ultimately utilized by the government in obtaining the release of the hostages, this court can envision no circumstances under which the plaintiff would not be entitled to compensation from the government." *Behring International, Inc. v. Miller*, No. 80-2864, slip op. at 11 (D.N.J. Dec. 24, 1980) (dictum). Many of the *amici curiae* have already been found to have property rights that may be vacated only in accordance with the Fifth Amendment. *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, 508 F. Supp. 49, 51 (S.D.N.Y. 1980).

2. The Fact That The Attachments of the *Amici Curiae* Were Obtained After Issuance Of A General License Authorizing Judicial Proceedings Does Not Adversely Affect Their Status As Compensable Property Interests

The Government has claimed that the International Emergency Economic Powers Act authorizes the Executive, upon a

declaration of a national emergency, to terminate orders of attachment validly issued by courts of competent jurisdiction, based on his authority under the IEEPA to "prevent or prohibit, any . . . transfer of . . . property" of Iran. The Government has used this argument to rebut the assertion of the *amici curiae* that their attachments constitute valuable and compensable property rights, presumably on the theory that an interest based on a revocable license cannot constitute "property."

(a) Since neither the IEEPA nor the Constitution grants the President authority to issue "revocable licenses" granting or denying, by executive fiat, the right of the amici curiae to sue in United States courts, the issuance of a "revocable license" authorizing the attachment was unnecessary

Because of the constitutional doctrine of separation of powers, the Executive has no inherent power to interfere with judicial process or limit the jurisdiction of the courts. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1872); *Marschalk Co., Inc.*, slip op. at 53. Since the IEEPA does not grant such authority to the Executive, the "license" granted by the Executive purporting to authorize lawsuits and permit the obtaining of prejudgment orders of attachment was unnecessary. The orders of attachment are therefore not revocable at the whim of the President.

The IEEPA was enacted to restrict presidential power under Section 5(b) of the Trading With the Enemy Act, 50 U.S.C. App. § 5(b) (1976 & Supp. I 1977) ["TWEA"]. *See* H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 2 (1977). Elaborating on these new restraints, the House Report states: "As a further substantive constraint, the scope of the authorities should be *clearly limited to the regulation of international economic transactions.*" *Id.* at 10-11 (emphasis added). "International

economic transactions" include "foreign exchange transactions, transfers of credit or payments between banking institutions where a foreign interest is involved, import or export of currencies or securities," and "control or freeze [of] property transactions where a foreign interest is involved." S. Rep. No. 95-466, 95th Cong., 1st Sess. 5 (1977). Thus, while the IEEPA used broad language to give the President emergency authority in the sphere of international economic affairs and foreign commerce, it did not grant blanket congressional authorization for the President to override federal court orders with respect to property in this country.[6] It is clear that the authority granted to the President in the IEEPA was never intended to embrace any action except the blockage of assets and embargoing of trade.

It is also clear that the IEEPA is not a delegation to the President of congressional authority to affect federal judicial jurisdiction. The Government has never shown any authority for the proposition that Congress, in enacting the IEEPA, intended the President to have authority to interfere with the workings of the courts.[7] *See Marschalk Co., Inc.*, slip op. at 30. The failure of the Government to establish congressional intent to limit the jurisdiction of the courts is especially noteworthy since, just one year earlier, Congress enacted the FSIA and thereby specifically granted jurisdiction over claims against foreign states to the

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[6] In the IEEPA, Congress specifically withdrew power from the President to vest frozen assets, a power which exists under the TWEA. When assets are vested under the TWEA, procedures exist for compensating claimants alleging an interest in the vested property or creditors of aliens whose property was seized. 50 U.S.C. App. §§ 9, 34. This Court has held that the TWEA "has been construed over the Government's objection, to require repayment of just compensation, when the [Alien Property] Custodian has liquidated the vested assets." Guessefeldt v. McGrath, 342 U.S. 308, 318 (1952).

[7] Indeed, even under the TWEA, it is clear that jurisdiction is not withdrawn from the district courts. Marschalk Co., Inc., slip op. at 25; Vishipco Line v. Chase Manhattan Bank, No. 77-1251 (S.D.N.Y. Nov. 3, 1978); Kuerschner & Rauchwarenfabrik, A.G. v. New York Trust Co., 126 F. Supp. 684 (S.D.N.Y. 1954). *Contra* Chase Manhattan Bank v. United China Syndicate, 180 F. Supp. 848 (S.D.N.Y. 1960).

district courts.[8] 28 U.S.C. § 1330. That jurisdiction included the power to issue both prejudgment and postjudgment orders of attachment. 28 U.S.C. §§ 1609, 1610. Given the express grant of jurisdiction in the FSIA, this Court should not find an implied abrogation of that grant in a delegation of certain powers to the executive branch which do not on their face deal with judicial process.[9] *Electronic Data Systems Corp., Iran v. Social Security Organization of Iran*, No. CA3-79-218-F, slip op. at 21, 24-25 (N.D. Tex. June 7, 1981); *National Airmotive Corp. v. Iran*, 499 F. Supp. 401, 405 (D.D.C. 1980); *see Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92 (1931).

As was recently declared by the court in *Electronic Data Systems Corp., Iran v. Social Security Organization of Iran*, No. CA3-79-0218-F (N.D. Tex. Feb. 12, 1981):

> I likewise conclude that despite the language in § 1702 that the President may nullify or void the exercise of any right, power or privilege with respect

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[8] Congress sought in the FSIA to preclude the intrusion of "diplomatic influences" of the type exerted by the Executive here. Marschalk Co., Inc., slip op. at 28-30.

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6606.

[9] The Government has also argued that a century-old statute, 22 U.S.C. § 1732, allows it to vacate the orders of attachment. It is clear, however, that that statute only authorizes the use of diplomatic or similar instrumentalities. Worthy v. Herter, 270 F.2d 905, 910 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959); Narenji v. Civiletti, 481 F. Supp. 1132, 1141 n.7 (D.D.C.), *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied sub nom.* Confederation of Iranian Students v. Civiletti, 446 U.S. 957 (1980) (22 U.S.C. § 1732 "does not act to authorize the Chief Executive to abrogate individual rights guaranteed by the Constitution"). *See* American International Group, Inc. v. Islamic Republic of Iran, Nos. 80-1779 and 80-1891 (D.C. Cir. June 5, 1981) (Mikva, J., concurring).

> to property in which a foreign country or a national thereof has any interest, Congress could not and did not intend to grant the President power to nullify or void valid exercises of the judicial power by Article III Courts.

Id. at 23; *accord Marschalk Co., Inc.*, slip op. at 17-25 (allowing President to interfere with Article III courts is inconsistent with the express language as well as the purposes of the IEEPA).

(b) Even if the President has constitutional or statutory authority to issue a "revocable license" granting the* amici curiae *access to United States courts, any attachment obtained pursuant to such license cannot be vacated without provision for compensation

The Government has argued the broad proposition that any and all rights acquired by virtue of a revocable license may be revoked at any time. This argument permits the Government to negate the element of a "taking," thereby insulating it from the need to pay compensation. Contrary to the rule urged by the Government, a valid property right acquired pursuant to a "revocable license" may not be constitutionally eliminated without just compensation. Precedent does not support a contrary view.

When the granting of a license or the exercise of a licensed right creates an independently valuable property interest, the taking of the property interest—whether by means of direct governmental action or attempted "revocation" of the initial license or authorization—compels the payment of just compensation. *See, e.g., United States v. Smoot Sand and Gravel Corp.*, 248 F.2d 822, 827-28 (4th Cir. 1957) ("It cannot be disputed that when one is assigned the right, pending its revocation, to use or assume something to the exclusion of all others, . . . he has a species of property . . . [which] cannot be taken away by

the United States even for a public use without the owner being made whole."); *Marschalk Co., Inc.*, slip op. at 75 ("[E]ven assuming IEEPA expressly authorizes the nullification of attachments, that authority is limited by claimant's Fifth Amendment rights to due process and to just compensation if private property is taken for public use."). For example, in *Brownell v. National City Bank*, 131 F. Supp. 60 (S.D.N.Y. 1955), the defendant bank was a trustee under an indenture which provided for the issuance of a series of bonds by a German company, A.E.G., which defaulted on the bonds. The bank then obtained a revocable license permitting it to apply the debtor's other funds held by it to A.E.G.'s bond obligations plus certain service fees owned to the bank and others. The Government subsequently revoked the license relating to the payment of the service fees and sought return of those funds. The bank defended on the grounds that it "had relied to its prejudice upon the grant of the license by disbursing some of the [service fees obtained] to third parties and in doing other acts." Thus, argued the bank, the Government "was estopped from revoking the license." *Id.* at 62. In holding for the bank, the court held that the case not only presented "a question of administrative estoppel" but also "a question of petitioner's powers under the [TWEA]." *Id.* at 63. In so holding, the court distinquished the situation from the Government's unquestioned power to "*revoke a continuing license* as to tangible realty and chattels." *Id.* (emphasis added).[10]

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[10] The elements of reliance and estoppel, partially relied upon by the district court in *Brownell*, are particularly glaring in the instant situation. In its reply brief submitted in New England Merchants Bank v. Iran Power Generation and Transmission Co., No. 80-6254 (2d Cir. Apr. 9, 1981), the Government, at page 6 n.*, admitted that it promulgated the license authorizing attachments to induce claimants to tie up Iranian property in the courts. This enabled the Government to obtain another bargaining chip in its quest for a political settlement of the crisis. *See also Blocking Iranian Property, Message to Congress Reporting on U.S. Action*, 15 Weekly Comp. Pres. Docs. 2118 (Nov. 14, 1979) (freeze instituted to "enable the United States to assure that these

An example of a case in which the Government had power to revoke a license without compensation is *Acton v. United States*, 401 F.2d 896 (9th Cir. 1968), *cert. denied*, 395 U.S. 945 (1969). In that case, the plaintiff, pursuant to an exploration permit granted by the Atomic Energy Commission, was issued a right of entry onto public lands for the purpose of prospecting for and developing uranium ore reserves. The permit provided that "[t]he Commander . . . shall have the right to withdraw this right of entry either in whole or in part at any time." *Id.* at 898. Upon withdrawal of the permit, the plaintiff sued the United States for compensation, claiming a Fifth Amendment taking. In rejecting the plaintiff's claim, the Court of Appeals emphasized that "[t]his obligation [to compensate], however, recognizes only vested property rights, and not the tenuous rights of licenses and permits, even though these at times may have value." *Id.* at 899.

The case of *Isthmian Airways, Inc. v. United States*, 94 Ct. Cl. 598 (1941), posed a similar situation. In *Isthmian Airways*, a revocable license allowed the plaintiff to occupy land and to erect hangers and shops to be used in operating an airline. An agreement reached between the plaintiff and the Governor of the Panama Canal Zone required the plaintiff, among other things, to pay "a rental of $100 per year" for the license. *Id.* at 599. After plaintiff breached its commitments, the Governor terminated the license and permit and required the plaintiff to

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resources will be available to satisfy lawful claims of citizens and entities of the United States against the Government of Iran.").

In reliance upon that statement, as well as the general license issued by the Department of the Treasury, the *amici* incurred substantial legal fees and disbursements to obtain and perfect their orders of attachment. "In so doing, it is clear that [the *amici curiae*] had a reasonable expectation that by relying on the government's action, it would not thereafter have its rights to the attachment nullified by another government action." Marschalk Co., Inc., slip op. at 81. The *amici curiae* are therefore in a different position than plaintiffs in American International Group, Inc., since the court held in that case that plaintiffs had no claim to a reasonable expectation that their rights would be protected. *Id.*, slip op. at 43.

remove its improvements from the land. The court rejected plaintiff's claim for compensation, citing the revocable nature of the license and plaintiff's failure to comply with the conditions of the permit.

A common theme runs through both *Acton* and *Isthmian Airways*. Both of those cases involved the licensing of rights in the nature of tenancies revocable at will. The licenses gave the plaintiffs nothing more than a continuing right to enter upon land and remain there for the purpose of prospecting for minerals (*Acton*) or operating a business (*Isthmian Airways*). The licenses did not confer upon either plaintiff a right which—if exercised—would have had the effect of merging the license into the interest acquired. In *Acton* and *Isthmian Airways*, the licenses or permits themselves—not the property acquired pursuant to the authorizations contained in the licenses—constituted the things of value. In neither case did plaintiffs lose those property interests which had been acquired pursuant to the licenses prior to their revocation.

Here, unlike the situation in *Acton* and *Isthmian Airways*, the *amici curiae* used the continuing license authorizing judical proceedings to obtain, prior to revocation, independently valuable property interests—valid prejudgment orders of attachment. These attachments have a value separate and apart from the license which authorized them. As did the bank in *Brownell*, the *amici curiae* relied on the license to obtain valuable property rights. Once the *amici curiae* so relied upon the license granted, the Government lost the ability to recreate the *status quo ante* by attempting to revoke the initial authorization, since, as in *Brownell*, there was nothing left to revoke.[11]

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[11] Orvis v. Brownell, 345 U.S. 183 (1953), does not mandate a different result. In *Orvis*, the plaintiff attempted to assert a property interest allegedly obtained through an order of attachment against the Alien Property Custodian. Plaintiff had never, however, obtained a license for such attachment. Furthermore, this Court expressly held that the attachments created a right in the attaching creditor as against the debtor. 345 U.S. at 186-87. Similarly, in the cases at bar, the *amici* have used their orders of attachment to obtain rights vis-a-vis the defendants, not the United States. *Orvis* is therefore properly distinguishable. Marschalk Co., Inc., slip op. at 70-72.

In sum, once the *amici curiae* relied on the license and acquired valid attachments, the Government lost the right to take those property interests without compensation.

3. The *Amici Curiae's* Claims Constitute Compensable Property Interests

Choses in action are property protected by the Fifth Amendment. *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951); *see Lynch v. United States*, 292 U.S. 571, 579 (1933); *United States v. Northern Pacific Ry. Co.*, 256 U.S. 51, 64-67 (1921). When the right to enforce a contract in the United States courts is taken away or materially lessened, the contract and the rights thereunder are "taken" within the meaning of the Fifth Amendment. *Marschalk Co., Inc.*, slip op. at 61; *Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955); *Gray v. United States*, 21 Ct. Cl. 340 (1886); *see also National Airmotive Corp. v. Government of Iran*, 499 F. Supp. 401, 406 (D.D.C. 1980). It is absolutely clear that the United States district courts have jurisdiction under the FSIA, including 28 U.S.C. § 1330, to hear private commercial disputes against foreign states and their agencies, instrumentalities and controlled entities.

B. The Purported Suspension of the Amici Curiae's *Claims and Vacatur Of Their Attachments Constitute A Compensable "Taking" Of Private Property*

It is well settled that the President must act in accordance with all the limitations imposed by the Constitution. *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion). The President's actions in connection with foreign affairs are not absolved from this requirement. The teaching of *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), for example, is only that the limits of delegation are not so stringently applied in the foreign relations area as in others. The *Curtiss-Wright* court specifically observed that executive power in foreign affairs is

subordinate to other constitutional provisions. *Id.* at 320. All treaties are thus subject to the Constitution. *See Reid v. Covert*, 354 U.S. at 17. Professor Henkin has similarly observed that "[n]othing in the Constitution suggests that the rights of individuals in respect of foreign affairs are different from what they are in relation to other exercises of governmental power." L. Henkin, *Foreign Affairs and the Constitution* 252 (1972).

The President, pursuant to Executive Order No. 12,294, has purported to "suspend" all claims until final disposition through the arbitral tribunal. As to the distinction between "terminating" or "suspending" lawsuits against Iran, "there is no practical difference." *Marschalk Co., Inc.*, slip op. at 60.

The Government has previously argued that it, not the *amici*, owns the claims against Iran, and that there can, therefore, be no "taking" of private property within the meaning of the Fifth Amendment.[12] The Government has explained that "[s]ettlement of an international claim is not a taking, because the claim belongs to the United States, . . . and because against foreign governments there can be no assured right of compensation." United States Brief at 28 n.*.

The Government unfortunately confuses its general power over the disposition of foreign claims with the ownership of those claims. Thus, in the Government's view, its purported power to settle claims precludes compensation for the exercise of that power. In fact, the Government's power to take property, whether by a foreign claims settlement or by an eminent domain proceeding, mandates a corollary right to Fifth Amendment compensation of those parties whose property has been taken.

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[12] *See, e.g.*, Brief In Support of United States' Motion to Vacate Attachment and for Stay of Litigation of Claims Subject to Arbitration at 28 n.*, New England Merchants National Bank v. Iran Power Generation and Transmission Co., No. 80-6254 (2d Cir. Apr. 9, 1981) ("United States Brief") ("The United States does not concede that settlement of a national's claim is a taking requiring compensation."); *see also id.* at 44 ("termination of attachments and other non-Iranian interests against Iranian assets causes no compensable loss.").

This right to compensation under the Fifth Amendment has been upheld by a number of courts. In *Gray v. United States*, 21 Ct. Cl. 340 (1886), one of the "French Spoliation Claims" cases, the Court of Claims found that the settlement of claims by the United States of its nationals against France for seizure of American ships in return for the renunciation by France of certain claims against the United States for treaty violations created a right to compensation under the Fifth Amendment. The Court of Claims stated:

> That any Government has the right to [settle claims of its citizens against a foreign state], as it has the right to refuse war in protection of a wronged citizen, or to take other action, which, at the expense of the individual, is most beneficial to the whole people, is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given him.

Id. at 392-93.

In *Aris Gloves, Inc. v. United States*, 420 F.2d 1386 (Ct. Cl. 1970), the Court of Claims denied Fifth Amendment compensation to a claimant whose property, located in Germany during World War II, was released to the U.S.S.R. as a result of the Potsdam Agreement. In denying the claim, the court held that a wartime appropriation of privately owned property found in enemy territory was an appropriation of enemy property, regardless of the owner's nationality.

Judge Nichols, in his concurring opinion, thoroughly analyzed the *Gray* case, including those factual elements in it which distinguished it from *Aris Gloves*. As Judge Nichols explained:

> It appears to me that to satisfy the *Gray* court, plaintiff here would have had to show as a minimum (a) that the acts of the USSR in seizing United States owned plants in East Germany as "reparations" were

> contrary to international law, (b) that the USSR's authorities would sooner or later have acknowledged the fact and paid compensation to the United States owners, and (c) that the United States representatives at Potsdam knowingly surrendered this possibility of compensation in return for concessions by the USSR in unrelated areas. Plaintiff has not even demonstrated proposition (a), still less the others.

420 F.2d at 1396-97.

In so explaining, Judge Nichols summarized the requisites for a "taking" compensable under the Fifth Amendment. These requisites essentially are (1) a valid cause of action, (2) the assurance of eventual compensation from the foreign state,[13] and (3) the compromise or settlement of the cause of action by the Government for a purpose (such as release of the hostages) unrelated to the merits of the claim. This analysis is supported by the *Restatement (Second) of the Foreign Relations Law of the United States* (1965):

> The question whether the United States must pay a national of the United States for waiving, or settling for less than full value, his claim for injury by a foreign state may arise in situations where the government may determine that other factors, such as political considerations, affecting the relations of the United States with the foreign state, call for a settlement less favorable to the United States than it would seek if it were concerned only with the economic considerations arising out of the claim and similar claims of other United States nationals.

Id. § 213, Reporters' Note.

All three requisite elements exist in the cases before this

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[13] *Compare* United States Brief at 28 n.* (allegation that "[s]ettlement of an international claim is not a taking . . . because against foreign governments there can be no assured right of compensation").

Court. Before the Government's settlement with Iran, the *amici curiae* had valid commercial causes of action against Iran or its agencies or instrumentalities[14] and all *amici* with valid attachments were assured of full payment through their attachments. Moreover, the Government clearly entered into the settlement for numerous reasons wholly unrelated to a settlement on the merits of the claims.[15]

As this Court has previously stated, "only those economic advantages are [property] 'rights' which have the law back of them and only when they are so recognized may courts compel others . . . to compensate for their invasion." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945). Thus, claimants without valid causes of action, or without a reasonable prospect of recovery absent governmental interference, are not entitled to compensation under the Fifth Amendment. In *United States v. Pink*, 315 U.S. 203, 228 (1942), for example, the Court expressly recognized that the Fifth Amendment was a limitation upon the operation of the Litvinov Assignment, an executive agreement recognizing the Soviet government and settling claims between American and Russian claimants. The claimants in *Pink* were non-nationals of the United States whose claims

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[14] Under the FSIA, a foreign state may not claim immunity from suit when, *inter alia*, a foreign state defendant has engaged in commercial activity. 28 U.S.C. § 1602, 1605(a)(2). Thus, as the District Court for the Southern District of New York observed with regard to 96 cases consolidatd before it, including most of the actions brought by the *amici curiae*:

> There is no question that the instant actions, bar none, are commercial in nature. Indeed, plaintiffs seek monetary damages for alleged civil wrongs ranging from the nationalization and/or conversion of personal property in Iran to the repudiation and breach of various and sundry executory contracts.

New England Merchants National Bank, 502 F. Supp. at 123; *see also id.* at 133. Thus, regardless of whether Iran may claim immunity from prejudgment attachment, there is no question that it may not, pursuant to the FSIA, claim immunity from suit.

[15] Indeed, the favored treatment received by some American interests—namely the banks—attests to the relative unimportance the Government placed on notions of equity as applied to individual claimants.

arose abroad and were not connected with the assets in question. The Court found that although aliens were protected by the Fifth Amendment, no private property was taken, since a state law establishing priorities among creditors, to the detriment of aliens, did not rise to the level of a taking of property for purposes of the Fifth Amendment. *See* Dean, *Amending The Treaty Power*, 6 Stanford L. Rev. 589, 605 (1954); *see also Marschalk Co., Inc.*, slip op. at 51 (*Pink* "do[es] not stand for the proposition that the President may take claims of United States citizens and use them as bargaining chips when negotiating an international agreement.").

Indeed, the enactment of the FSIA presages a modern era of Fifth Amendment cases. Unlike the pre-1976 precedents cited by the Government,[16] the cases at bar indisputably involve judicially cognizable claims fully secured by valid prejudgment attachments.[17] Since the passage of the FSIA, the executive branch may no longer argue that all foreign claims are contin-

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[16] Prior to enactment of the FSIA, a judgment creditor was unable to execute on property of a foreign state debtor. Electronic Data Systems Corporation, Iran v. Social Security Organization of Iran, No. CA3-79-218-F, slip op. at 17 (N.D. Tex. June 7, 1981). Even the most recent settlement cited by the Government (between the United States and the Peoples Republic of China) compromised claims that had arisen prior to the FSIA. *See* Comment, *The Blocked Chinese Assets-United States Claims Problem: The Lump Sum Settlement Solution*, 3 Fordham Int'l L.J. 51 (1979-1980). Pre-FSIA precedent is therefore no longer dispositive. Marschalk Co., Inc., slip op. at 52.

[17] Many of the cases relied upon by the Government are thus inapposite. For example, the reasoning of Avramova v. United States, 354 F. Supp. 420 (S.D.N.Y. 1973), is inapplicable since the court therein based its reasoning on the fact that adjudication by a claims commission does not create a vested right to payment of the claims. The *amici curiae* do have vested rights in litigating their claims and in their orders of attachment obtained pursuant to the FSIA. *See also* United States v. Guy W. Capps, Inc., 204 F.2d 655, 660 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955) (executive agreements may not conflict with prior statute or treaty); Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955) (executive agreement between the United States and Austria could not abrogate plaintiff's right to just compensation following a governmental taking).

gent in nature, subject to unrestricted compromise by the United States in furtherance of its foreign policy objectives. Section 1602 unambiguously provides: "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States *in conformity with the principles set forth in this chapter.*" (Emphasis added.) As in *Williams v. Heard*, 140 U.S. 529, 541 (1890),

> [The claims] were rights growing out of property; rights, it is true that were not enforceable until after the passage of the Act of Congress for the distribution of the fund. But the Act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. All that the Act of Congress did was to provide a remedy for the enforcement of the right.

The FSIA provides a similar remedy.

Thus, the taking of the *amici's* claims and orders of attachment for a public purpose of the Government, mandates compensation.

C. *Since The Government Has Taken Property Of The* Amici Curiae *For A Public Purpose, The* Amici Curiae *Are Entitled To Just Compensation, Which The* Amici Curiae *Have Not Received. The Issue Of Compensation Is Therefore Ripe For Adjudication By This Court*

The compensation which the Fifth Amendment requires is the "full monetary equivalent" of the property interests which were taken. "The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *United States v. Reynolds*, 397 U.S. 14, 16 (1970). The fact that the exact dollar amount to which a claimant is entitled cannot be established at the time of the taking is irrelevant in determining whether such a claim exists. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124 (1974).

Pursuant to the Agreement which settled the Iranian crisis, most of the claims of American nationals against Iran are to be resolved by the Iran-U.S. Claims Tribunal, an arbitral tribunal to be established at The Hague. Declaration of the Government of the Democratic and Popular Government of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran art. II ("Claims Settlement Declaration") (App. 30). The United States agreed to terminate claimants' lawsuits, cause the claimants' attachments to be vacated and return previously attached funds to Iran. Declaration of the Government of the Democratic and Popular Government of Algeria, Gen. Prin. ¶ B ("Declaration") (App. 21). A security fund of $1 billion will be created out of frozen Iranian assets from which the arbitral awards will be paid. Iran has agreed to replenish the fund if and when it falls below $500 million. *Id.* ¶ 7. The Claims Settlement Declaration sets no priorities with respect to access to the Tribunal or with respect to the order of payment of awards.

Many of the *amici curiae* view Iran's promise to replenish the security fund with profound skepticism. An examination of the complaints filed in the District Court for the Southern District of New York, for example, reveals that non-bank claims in that district alone total more than $1 billion. Under the Iran-U.S. Settlement Agreement, therefore, the *amici curiae* with valid attachment orders could well be in a far worse position than if their lawsuits were continued. Many of these *amici curiae* will be compelled to trade a United States forum[18] and full security

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[18] In addition to losing their attachments, some *amici curiae* will be denied access to the Tribunal and, thus, even to the limited security fund. The jurisdiction of the Tribunal does not include "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole discretion of the competent Iranian courts in response to the Majlis position." Claims Settlement Declaration art. II(1). Also excluded are claims arising out of the seizure and detention of the hostages and "injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran." Declaration ¶ 11.

in exchange for possible access to a limited fund.[19] Indeed, one court has already found that "[i]n the instant cases, nothing has been received in exchange for the suspension of litigation in the United States." *Marschalk Co., Inc.*, slip op. at 46. *Contra American International Group, Inc.*, slip op. at 38.

Should the executive orders and regulations implementing the Iran-U.S. Settlement Agreements be held constitutional, the *amici* who are not eligible to participate in the arbitral tribunal will be stripped of their secured claims and, after obtaining judgments, will be forced to chase Iranian assets across the globe in the hopes of satisfying those judgments.[20] Those *amici* who are fortunate enough to fit the eligibility requirements of the Iran-U.S. Settlement Agreement will be ousted from the United States court system, and be forced to bring their claims in an international arbitral tribunal, no doubt incurring substantial additional expenses in order to comply with procedures that have not yet been disclosed, with final awards fully secured only by an Iranian promise to pay.

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[19] *See* Swift & Company Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684, 697-98 (1950) (improper for court to relegate American citizen to foreign forum "without assuring the citizen that respondents would appear in those courts and that security would be given equal to what had been obtained by attachment in the District Court").

[20] The Court of Appeals for the First Circuit has pointed out, in connection with its holding that the compensation issue is not ripe for review, that the "Tribunal Award may . . . be more valuable, in terms of enforcement abroad, than an equivalent unsecured United States court judgment." Chas. T. Main International Inc. v. Khuzestan Water & Power Authority, No. 80-1027, slip op. at 24 (1st Cir. May 22, 1981). For those *amici* who are barred from the Tribunal, the proper comparison is between a fully secured United States court judgment and an unsecured one (since all attachments are purportedly vacated pursuant to the Iran-U.S. Settlement Agreement). For other *amici* who may participate in the Tribunal, the proper comparison is between a fully secured United States court judgment and a Tribunal award backed by a possibly limited security fund and an Iranian promise to pay. The *amici* submit that the *Chas. T. Main* court and the court in American International Group, Inc. v. Islamic Republic of Iran, Nos. 80-1779 and 80-1891 (D.C. Cir. June 5, 1981) failed to realize the full effect of the Iran-U.S. Settlement Agreement.

A right to compensation has been expressly recognized by several district courts in the context of the Iranian cases.

> [L]evies made under orders of the Court vested in these plaintiffs certain inchoate rights to the frozen Iranian assets. Although these rights may not now be fixed and certain, they still are rights in property. As a result, the cancellation of these rights by the executive department may only be accomplished by due process of law.

New England Merchants National Bank, 508 F. Supp. at 51. *See also id.* at n.3, *quoting National Airmotive Corp. v. Iran*, 499 F. Supp. 401, 406 n.10 (D.D.C. 1980) ("the United States always retains the option of spending tax funds in pursuit of its foreign policy objectives, as distinguished from private funds or claims to private funds where its authority is much more limited"). This liability was also recognized in *Behring International, Inc. v. Miller*, No. 80-2864 (D.N.J. Dec. 24, 1980):

> So long as citizens of this country remain hostage to a foreign power, the Executive must have the means to deal with that situation. The rights of the plaintiff, in the interim, have not been violated or altered, but on the contrary are preserved as against the subject fund. Even if said funds were ultimately utilized by the government in obtaining the release of the hostages, *this court can envision no circumstances under which the plaintiff would not be entitled to compensation from the government.* No matter how just the cause, an individual's property may not be utilized by the government without due process and just compensation. U.S. CONST. amend. V.

Id. at 11 (emphasis added).

It is apparent that most, if not all, *amici curiae* are unable, at the time of submission of this brief, to quantify the amount of their losses caused by implementation of the Iran-U.S. Settle-

ment Agreement.[21] The inability to value the loss with precision, however, is not fatal to the *amici curiae's* right to adjudication of the taking issue, since the rule expressed in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), is directly on point. There, major creditors and the sole stockholder of a railroad in reorganization challenged the constitutionality of the Regional Rail Reorganization Act of 1973 on several grounds, including the Government's failure to provide a compensation mechanism for the plaintiffs' losses. The "losses" alleged were of two types: (1) losses sustained because the Act provided for inadequate compensation for railroad property condemned, and (2) so-called "erosion taking" losses which the plaintiffs contended would be caused by the Act's requirement that the railroad continue to operate pending reorganization. The plaintiffs alleged that this continued operation would generate operating losses which would, over time, further reduce the value of their property interests in the bankrupt's estate.

In a lengthy opinion, this Court decided that the Act was not unconstitutional because the plaintiffs had access to the Court of Claims under the Tucker Act, thus effectively holding that the provision for just compensation was a condition precedent to a finding of constitutionality, the same holding which the *amici curiae* urge in the case at bar. This Court further held that such claims for losses—including losses alleged to arise out of the effect of an "erosion taking"—were ripe for adjudication. As this Court declared:

> We conclude in any event that the availability of a Tucker Act remedy if the Rail Act effects an "ero-

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[21] Such losses may, in some cases, equal the difference between the amount awarded by the Iran-U.S. Claims Tribunal and the amount received from the limited security fund, assuming Iran fails to abide by its commitment to replenish the security fund. Such losses may be calculated differently for those *amici curiae* who lose their attachments and are denied access to the Tribunal because of the Agreement's exclusionary clauses. These *amici* may be entitled to an amount up to the amount originally attached, assuming, of course, that they prevail in court on the merits of their claims. Still other *amici curiae* may be entitled to other measures of compensation if, for example, the Tribunal, for political or other reasons, fails to accord them a fair hearing or other rudiments of due process. In such cases, the ousting of these *amici* from United States courts will have generated losses independent from those resulting from any nullification of the existing attachment orders.

> sion taking" is ripe for adjudication. *It is true that there has been no definitive determination that erosion of the Penn Central estate has reached unconstitutional dimensions*—that is, that the estate has suffered losses unreasonable even in light of the public interest in continued rail service pending reorganization. But the Penn Central Reorganization Court found that Penn Central [was sustaining continuing operating losses] . . . . Thus, failure to decide the availability of the Tucker Act would raise the distinct possibility that those appellees would suffer an "erosion taking" without adequate assurance that compensation will ever be provided.

419 U.S. at 123-24 (emphasis added).[22]

Similarly, in *Stringer v. United States*, 471 F.2d 381 (5th Cir.), *cert. denied*, 412 U.S. 943 (1973), plaintiffs-land owners sued the Government for damages, based on their Fifth Amendment rights to due process and just compensation, after the United States seized their property without notice and without initiating condemnation proceedings. In holding for the Government, the Fifth Circuit explained that—"high-handed" though it may be—the Government may constitutionally seize property without notice or hearing. 471 F.2d at 384. The only constitutional predicate was the availability of a Tucker Act remedy. As the *Stringer* court declared, determination of the availability of a Tucker Act remedy is required *at the time of the taking* and may not be deferred to a date when the amount of loss is quantifiable. This is particularly true when—as in the instant cases—the Government has, on the one hand, sought to seize the property

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[22] Contrary to the analysis of the Court of Appeals in American International Group v. Islamic Republic of Iran, Nos. 80-1779 and 80-1891, slip op. at 38 (D.C. Cir. June 5, 1981), this Court in the *Regional Rail Reorganization Act Cases* was careful to establish that it was not certain that plaintiffs would in fact suffer losses because of the "erosion taking."

interests of the *amici curiae* while, on the other hand, denied the availability of a Tucker Act remedy. United States Brief at 28 n.*. The Government cannot have it both ways. *See also United States v. Dow*, 357 U.S. 1 (1958); *Hurley v. Kincaid*, 285 U.S. 95 (1932).

Thus, a taking has occurred and the compensation issue is ripe for consideration.

D. This Court Should Hold That The Court Of Claims Has Jurisdiction To Determine Claims For Compensation Brought By The Amici Curiae *Who Have Suffered Losses*

Essential to this Court's finding that the Iran-U.S. Settlement Agreement is constitutional is a determination that either a mechanism exists by which the *amici* may recover compensation when the *amici's* losses may be quantified or that the United States must fashion a remedy by which the *amici* can be made whole. The Tucker Act provides the *amici* with a forum to adjudicate their claims for compensation since Congress waived the United States' immunity with respect to "any claims against the United States founded . . . upon the Constitution." 28 U.S.C. § 1491. Indeed, as the decision in the *Regional Rail Reorganization Act Cases* explains, the remedy provided by the Tucker Act fulfils the constitutionally mandated requirement for just compensation. If there were no access to the Court of Claims for the *amici curiae*, the Government's implementation of the Iran-U.S. Settlement Agreement would be unconstitutional. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Marschalk Co., Inc.*, slip op. at 82-83; *see also United States v. Dow*, 357 U.S. 17 (1958); *Hurley v. Kincaid*, 285 U.S. 95 (1932); *Stringer v. United States*, 471 F.2d 381 (5th Cir.), *cert. denied*, 412 U.S. 943 (1973).

The district court in *Marschalk Co., Inc.*,—recognizing that claimants' access to the Court of Claims was a condition precedent to a finding of constitutionality—held that the Tucker Act's treaty exclusion provision, 28 U.S.C. § 1502, barred the claimant's access to the Court of Claims in the cases at bar. Thus, the Iran-U.S. Settlement Agreement could not be constitutionally implemented absent an express provision for compensation. *Marschalk Co., Inc.*, slip op. at 82-84.

Under Section 1502, "the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations." Contrary to the conclusion of the *Marschalk* court, other courts have been uniform in their interpretation that, in order for Section 1502 to be applicable, there must exist a direct, proximate connection between a treaty stipulation and a claim such that the right itself upon which the claim is founded "must have its origin—derive its life and existence—from some treaty stipulation." *United States v. Weld*, 127 U.S. 51, 56 (1887).

For example, the claim in *United States v. Weld* involved a suit against the Government for the unpaid balance of a judgment rendered by the Court of Commissioners of Alabama Claims. That court had been created by Congress to adjudicate claims against the British Government arising from maritime losses inflicted during the Civil War by the Confederate cruisers "Alabama" and "Florida," which were built and supplied by the British Government. Funds necessary to satisfy such claims were initially paid into the Treasury of the United States by the British government pursuant to the Alabama Claims Treaty and the Geneva Award.

This Court held that the plaintiff's claim arose out of the judgment of the Court of Commissioners and the congressional act appropriating the funds to satisfy such judgments, not the treaty. The Court of Claims therefore had jurisdiction over plaintiff's cause of action. *See United States v. Old Settlers*, 148 U.S. 427, 468-69 (1893), (a case "growing out of a treaty is one involving rights given or protected by a treaty").[23]

In *Societe Anonyme Des Ateliers Brille Freres v. United States*, 160 Ct. Cl. 192 (1963), a French corporation, sought to recover settlement funds held by the United States pursuant to

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[23] In *Eastern Extension, Australasia & China Telegraph Co. v. United States*, 251 U.S. 326 (1913), the appellant constructed telegraph cables between Hong Kong and the Philippines pursuant to a contract with Spain which granted appellant an annual subsidy. The United States subsequently assumed sovereignty over the Philippines as a result of a treaty with Spain. After the United States failed to pay the subsidy, appellant sued, arguing that the United States had assumed Spain's contractual obligations. The Court of Claims dismissed the petition. *[footnote continued on following page.]*

an escrow agreement and relating to the United States use, as licensee, of plaintiff's patents during World War II. The funds were to be held in escrow pending determination of the applicability of the Byrnes-Blum Agreement between France and United States, under which France had agreed to pay its nationals' war-related claims against the United States. Following the reasoning of *Weld* and *Old Settlers*, Chief Judge Jones stated:

> The Byrnes-Blum Agreement has not been drawn into consideration in this case in the manner anticipated by the Supreme Court in the Old Settlers case, *supra* . . . . *Indeed, this case would never have arisen were it not for the existence of the Byrnes-Blum Agreement*, because it is that very Agreement that motivated the parties to establish the "escrow" account around which this dispute is centered. *Yet that is a far cry from finding that the claim before us "derives its life and existence" from some treaty stipulation*, as the Weld case, *supra*, would require. Instead, the substance of plaintiff's claim is derived from the original patent license contract. This is at the heart of its claim to royalties.

Id. at 197-98 (emphasis added) (citations omitted).

Thus, although a treaty may create a factual situation from which a claim may arise, the determination of the applicability of Section 1502 rests upon the legal genesis of that claim. In other words, the legal right asserted must be one which is derived from a treaty or from the provisions of a treaty, rather than a legal right which is created by the Constitution or laws of the United States. *See also Hughes Aircraft Co. v. United States*, 534 F.2d 889 (Ct. Cl. 1976); *S.N.T. Fratelli Gondrand v. United States*, 166 Ct. Cl. 473 (1964).

This Court held that to the extent the appellants' claim was "deemed to rest *exclusively* upon the transfer of sovereignty, upon the theory that thereby, under the principles of international law, an obligation in [appellant's] favor was imposed on the United States," *id.* at 333 (emphasis added), the claim grew out of or was dependent upon a treaty, and was barred. The Court also held, however, that if the petition stated that a contract was to be implied because of the United States' use of appellant's facilities, the Court of Claims would have jurisdiction to hear the action.

The right to recover in the instant cases is founded upon the Fifth Amendment, and not the Iran-U.S. Settlement Agreement. Indeed, even if the security fund established under the Agreement were the exclusive resource from which awards would be satisfied (which it is not), the "right itself" would not derive from these executive agreements. The jurisdictional limitation of Section 1502, therefore, does not exclude the *amici curiae* from the Court of Claims.

Should this Court determine that the *amici* and other parties similarly situated are barred from the Court of Claims and that the United States has failed to provide a remedy by which compensation for the taking may be recovered, this Court must preclude the implementation of the Iran-U.S. Settlement Agreement until such time as a mechanism for compensation is provided. Without the availability of such a procedure, the President's actions are without authority and are constitutionally infirm.

CONCLUSION

For the reasons set forth above, the question presented to the Court should be answered in the affirmative.

Dated: June 19, 1981

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APPENDIX A

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Sedco International, S.A. v. NIOC, 79 Civ. 6115 (WCC)
Sediran Drilling Company v. NIOC, 79 Civ. 6116 (RJW)
Sediran Drilling Company v. NIOC, 79 Civ. 6117 (TPG)
Williams Brothers International Corp. v. NIOC, 79 Civ. 6195 (LPG)
Williams Brothers International Corp. v. NIOC, 79 Civ. 6196 (LPG)
Sedco, Inc. as Assignee of Iran Marine Industrial Company v. NIOC, 79 Civ. 6279 (LPG)
Otis Engineering Corporation v. NIOC, 79 Civ. 6484 (RWS)
Halliburton Limited v. NIOC, 79 Civ. 6485 (RWS)
Houston Contracting Company v. NIOC, 79 Civ. 6488 (GLG)
Houston Contracting Company v. NIOC, 79 Civ. 6489 (MEL)

IMCO Services (U.K.) Ltd. v. NIOC, 79 Civ. 6525 (LPG)
Ingersoll-Rand Co. v. NIOC and National Iranian Gas Co. ("NIGC"), 79 Civ. 6867 (RWS)
Irano-Reading & Bates, S.S.K. v. NIOC, 79 Civ. 6831 (VLB)
Enserch Service Company of Iran v. NIGC and NIOC, 80 Civ. 0560 (WCC)
Williams Brothers International Corp. v. NIOC, 80 Civ. 1099 (LPG)
Compagnie Francaise de Prospection Sismique v. NIOC, 80 Civ. 1920 (ADS)
Houston Contracting Company v. Chase Manhattan Bank, N.A. and Bank Tejarat, 80 Civ. 3441 (LPG)
Shirazi v. Bank Markazi Iran, 80 Civ. 6117 (RO)
Brown & Williamson Tobacco Corp. v. Ministry of Mines and Light Industry of the Gov't of Iran, World Express Co., Ministry of Tourism of the Gov't of Iran and the Islamic Republic of Iran, 81 Civ. 0283 (CLB)
Enserch Corp., Tair Inc. and Intairdril v. NIOC, Islamic Republic of Iran and Irano-Intairdril, S.S.K., 81 Civ. 0292 (LWP)
Brown & Root, Inc., Brown & Root, S.A. and Brown & Root International v. Government of Iran, Civ. Action No. R80-2961 (D. Md.)
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No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership,
Petitioner,

v.

DONALD T. REGAN, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF SPERRY CORPORATION AND SPERRY WORLD TRADE, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 36.3 of the Rules of this Court, Sperry Corporation and Sperry World Trade, Inc. ("Sperry") respectfully move the Court for leave to file a brief as *amici curiae* in support of Petitioner. Petitioner Dames & Moore, the federal respondents, and intervenor Bank Markazi have consented to the filing of this brief. The Islamic Republic of Iran and the Atomic Energy Organization of the Islamic Republic of Iran, intervenor-respondents, have refused consent to the filing of an *amicus* brief by Sperry.

As noted in the "Interest of Amici Curiae", Sperry has commenced an action against Iran and its controlled entities, which action is now pending in the U.S. District Court for the District of Columbia. *Sperry Corporation, et al.* v. *Islamic Republic of Iran, et al.*, No. 80-1614 (D.D.C., filed July 1, 1980). In that case Sperry has op-

posed the efforts of the United States to suspend litigation and to vacate a "post-freeze" prejudgment attachment of Iranian bank accounts on the ground that the Executive's actions violate fundamental separation of powers principles.

This case presents issues of overwhelming national importance—namely the constitutionality of executive actions intended to implement the accords between the United States and Iran by seeking the suspension of pending legislation and by nullifying attachments of Iranian assets obtained after November 14, 1979. The asserted power of the executive branch, through Executive Orders and regulations, to oust federal courts of jurisdiction over pending cases and to avoid federal attachment orders raises fundamental questions concerning the distribution of power among co-equal branches of government, which only this Court can authoritatively resolve.

These issues are of vital interest to Sperry and to claimants in approximately 400 other pending cases involving Iran and its property. The participation of other claimants, such as Sperry, will be of benefit to the Court by insuring presentation of the full range of constitutional issues involved. This benefit has been previously acknowledged by this Court's grant of Sperry's motion to file in support of the petition for certiorari, as well as by the Court of Appeals for the District of Columbia Circuit, which granted Sperry's motion to file a brief *amici curiae* in a case presenting identical issues, *American Int'l Group, Inc., et al.* v. *Islamic Republic of Iran, et al.*, No. 80-02791 (D.C.Cir.).

It is therefore respectfully requested that this motion to file a brief as *amici curiae* in support of Petitioner be granted.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. The President Has No Constitutional Authority To Suspend Litigation Against Iran Pursuant To An Executive Agreement 2

A. The President's Ability To Conclude International Agreements Is Limited By The Constitution And Acts Of Congress 2

B. Submission Of Claims Against Iran To The Jurisdiction Of The Federal Courts Under The FSIA Deprives The President Of Authority To "Settle" Such Claims By Executive Agreement 5

C. Judicial Or Legislative Approval Of Prior International Settlements Does Not Support The Executive's Claimed Authority To Implement The Agreement With Iran 13

II. The President Lacks Statutory Authority To Order The Suspension Of Jurisdiction Or The Nullification Of Attachments Obtained Under The FSIA 17

A. The IEEPA Does Not Authorize The President To Suspend Prosecution Of Claims Against Iran 18

B. The IEEPA Does Not Authorize The President To Nullify Attachments Issued By The Courts Pursuant To An Express License 22

C. The Hostage Act Does Not Provide Authority For The President's Actions 28

III. The Executive Agreement With Iran Violates The Fifth Amendment 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES: Page

Acton v. United States, 401 F.2d 896 (9th Cir. 1968) *cert. denied*, 395 U.S. 945 (1969) 27

American Int'l Group Inc., et al. v. Islamic Republic of Iran, et al., No. 80-1779 (D.C.Cir. June 5, 1981) . passim

Ames v. Merrill Lynch, Pierce, Fenner & Smith, 567 F.2d 1174 (2d Cir. 1977) 10

Behring International, Inc. v. Miller, No. 80-2864, (D.N.J. Dec. 24, 1980) 23

Berkovitz v. Arbib & Houlberg, Inc., 230 N.Y. 261, 13 N.E. 288 (1921) 10

Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, et al., No. 80-1027 (1st Cir. May 22, 1981) ..... passim

Consumers Union of United States Inc. v. Rogers, 352 F.Supp. 1319 (D.D.C. 1973) 13

Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972) 10

Electronic Data Systems Corporation Iran v. Social Security Organization of Iran, No. 3-79-0218-F (N.D.Tex. June 7, 1981) ..... passim

Ex Parte Peru, 318 U.S. 578 (1948) 6

Ferrera v. United States, 424 F.Supp. 888 (S.D.Fla. 1976) 21

Gibbes v. Zimmerman, 290 U.S. 326 (1933) 10

Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824) 4

Hall v. Beals, 396 U.S. 45 (1969) 10

Haney v. Chesapeake & Ohio Railroad Company, 498 F.2d 987 (D.C.Cir. 1974) 9

Jet Line Services, Inc. v. M/V Marso El Hariga, 462 F.Supp. 1165 (D.Md. 1978) 7

Marschalk Company, Inc. v. Iran National Airlines Corp., No. 79-Civ. 7035(CBM) (S.D.N.Y. June 11, 1981) ..... passim

Missouri v. Holland, 252 U.S. 416 (1920) 17

Table Of Authorities Continued

Page

Montana Power Co. v. F.P.C., 445 F.2d 739 (D.C.Cir. 1970) 10

National Airmotive Corp. v. Iran, 499 F.Supp. 401 (D.D.C. 1980) 20

New England Merchants National Bank v. Iran Power Generation and Transmission Co., 502 F.Supp. 120 (S.D.N.Y. 1980) 23

New England Merchants Bank v. Iran Power Generation and Transmission Company, Nos. 80-6254-6349 (2nd Cir. April 9, 1981) 3

Orvis v. Brownell, 345 U.S. 183 (1953) 21, 24, 25, 26

Price & Baker v. Madison, 95 N.W. 933 (S.D. 1903) ... 27

Propper v. Clark, 337 U.S. 472 (1949) 21

Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972). 10

Stoehr v. Wallace, 255 U.S. 239 (1921) 26

United States v. Alaska Steamship Co., 253 U.S. 113 (1920) 10

United States v. Belmont, 301 U.S. 324 (1937) 16, 17

United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936) 15, 16

United States v. Fuller, 409 U.S. 488 (1973) 27

United States v. Guy W. Caps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds,* 348 U.S. 296 (1955) 13

United States v. Klein, 80 U.S. (13 Wall.) 128 (1872). 13

United States v. Pink, 315 U.S. 203 (1942) 16, 17

United States v. Schooner Peggy, 5 U.S. 1 (1 Cranch) 103 (1801) 8, 9

Vishipco Line v. Chase Manhattan Bank, No. 77-1251 (S.D.N.Y. Nov. 3, 1978) 21

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) 4

Z & F Assets Realization Corp. v. Hull, 311 U.S. 470 (1941) 15

Table Of Authorities Continued

Page

Zittman v. McGrath, 341 U.S. 446 (1951) 21, 25
Zittman v. McGrath, 341 U.S. 471 (1951) 24, 25

U.S. Constitution:
U.S. Const. Art. I ..... passim
U.S. Const. Art. II ..... passim
U.S. Const. Art. III ..... passim
U.S. Const. Amend. V 28

Statutes, Regulations and Executive Orders:
Foreign Sovereign Immunities Act
28 U.S.C. § 1330 ..... 6, 10
28 U.S.C. § 1602 6
28 U.S.C. § 1606 10

Trading With The Enemy Act
50 U.S.C. App. § 5(b) 19, 21, 25
50 U.S.C. App. § 6 26
50 U.S.C. App. § 9 ..... 24, 26
50 U.S.C. App. § 34 26

International Emergency Economic Powers Act
50 U.S.C. § 1701 18
50 U.S.C. § 1702 ..... 18, 26
50 U.S.C. §§ 1701-17 ..... passim

Other Statutes, Regulations, and Executive Orders
22 U.S.C. § 1732 28
31 C.F.R. Pt. 535 ..... passim
Executive Order 12,170, 44 Fed.Reg. 67729 18
Executive Order 12,294, 46 Fed.Reg. 14111 ..... 7, 19

Table Of Authorities Continued

Page

MISCELLANEOUS:

R. Berger, Executive Privilege: A Constitutional Myth (1974) 4

Comment *"Self-Executing Executive Agreements A Separation Of Powers Problem,"* 24 Buffalo L. Rev. 137 (1975) 15

Hearings on H.R.11315, Subcomm. on Administrative Law and Governmental Relations, House Comm. on Foreign Rel., 94th Cong., 2d Sess. (1976) 7

5 Hackworth, Digest of International Law (1943) 15

L. Henkin, Foreign Affairs and the Constitution (1973) 3

H.R. Rep.No. 1507, 77th Cong., 1st Sess. (1941) 26

H.R. Rep.No. 1487, 94th Cong., 2d Sess. *reprinted in* [1976] U.S.Code Cong. & Ad. News 6604 .....6, 11

H.R. Rep.No. 459, 95th Cong., 1st Sess. (1977) ... 19, 20, 26

Leigh & Atkeson, Due Process in the Emerging Foreign Relations Law of the United States, 22 Bus. Law 3 (1966) 15

Ohly, Advice and Consent: International Executive Claims Settlement Agreements, 5 Cal. W. Int'l. L.J. 271 (1975) 13, 14

Restatement (Second) of the Law of Foreign Relations (1965) 3

S.Rep. No. 466, 95th Cong., 1st Sess. 5 (1977), *reprinted in* [1977] U.S. Code Cong. & Ad. News 4540 19

S.Rep. No. 911, 77th Cong., 1st Sess. (1941) 26

IA Sands, Sutherland Statutory Construction (4th ed. 1972) 3

United States-Egypt Claims Settlement, 27 U.S.T. 4214, T.I.A.S. 8446 (1976) 14

United States-Hungary Claims Settlement, 24 U.S.T. 522, T.I.A.S. 7569 (1973) 15

Table of Authorities Continued

Page

United States-People's Republic of China Claims Settlement, T.I.A.S. 9306 (1979) 14

United States-Poland Claims Settlement, 11 U.S.T. 1953, T.I.A.S. 4545 (1960) 15

14 Whiteman, Digest of International Law (1967) ... 12

No. 80-2078

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OCTOBER TERM, 1980

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DONALD T. REGAN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF SPERRY CORPORATION AND SPERRY WORLD TRADE, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF AMICI CURIAE

Sperry Corporation and Sperry World Trade, Inc. have an interest in resolution of the questions presented for review in this case. They are claimants in *Sperry Corporation, et al.* v. *Islamic Republic of Iran, et al.*, No. 80-1614 (D.D.C., filed July 1, 1980), and have obtained a prejudgment attachment of Iranian bank deposits valued at $7 million. Their interest will be directly affected by this Court's decision involving identical issues. This interest has been previously recognized in grant of *amici's* motion to file in support of the petition for certiorari.

SUMMARY OF ARGUMENT

The Executive's authority to enter into international agreements, although broad, is not unlimited. The President's foreign relations power under Article II does not authorize the President to settle a commercial claim against a foreign state, where Congress has enacted a statute providing U.S. nationals with the right to prosecute such claims in federal courts free of interference from the Executive. The President possesses no statutory authority which would empower him to interfere with the jurisdiction of federal courts to adjudicate cases before them or to nullify prejudgment attachments obtained pursuant to an express license. The Executive's actions in seeking to implement the international agreement with Iran impermissibly infringe on the powers reserved to Congress and the judiciary by the Constitution, and violate the Fifth Amendment by taking property without payment of just compensation.

ARGUMENT

I. The President Has No Constitutional Authority To Suspend Litigation Against Iran Pursuant To An Executive Agreement.

Amici are properly sensitive to the extraordinary tensions created by Iran's seizure and illegal detention of the American hostages, and are well aware of the considerable pressure exerted on the President to secure their release through peaceful means. Notwithstanding the national interest in resolving this difficult international crisis it is clear that any agreement reached wth Iran must be one that is consistent with the Constitution.

A. The President's ability to conclude international agreements is limited by the Constitution and acts of Congress.

The Executive appears unwilling to admit of any limitation on the President's authority to negotiate or conclude an international claims settlement agreement. However, it

is clear that any limitations that are imposed by the Constitution on the subject matter and effect of treaties apply equally to executive agreements.[1] Thus, neither the Executive, nor Congress and the Executive acting together can make an international agreement which violates, for example, the Fifth Amendment.[2] An executive agreement, such as that involved here, which is concluded by the President without Senate approval is subject to additional limitations. While the President may by executive agreement deal "with any matter that under the Constitution falls within the independent powers of the President", such agreement becomes effective as *domestic* law only if it is not in conflict with earlier acts of Congress.[3]

The President's power, if any, to enter into the agreement with Iran must stem from an Act of Congress or the Constitution itself. *Marschalk Company, Inc.* v. *Iran National Airlines Corp.*, No. 79-Civ. 7035(CBM) (S.D.N.Y., June 11, 1981) (Slip Op. at 15).[4] Although the Govern-

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[1] L. Henkin, *Foreign Affairs and the Constitution* 180 (1973) (hereinafter cited as "Henkin").

[2] As Restatement (Second) of the Law of Foreign Relations (1965) (hereinafter "Restatement"), § 117, comment (d) explains:

> "*No power granted to the United States by the Constitution is unlimited* . . . Notwithstanding the existence of an affirmative constitutional power in the federal government to deal with a matter by international agreement, the constitutional limitations upon action by the government may nevertheless prohibit the making of the agreement. *Such limitations as those contained in the Bill of Rights apply to action taken under the grant of the power to make international agreements just as to action taken under other grants of government power.*"

(All italics in quotations have been added except where otherwise noted.)

[3] Restatement, §§ 121, 144. *See also* 1A Sands, Sutherland Statutory Construction § 32.06 (4th ed. 1972): "Valid enactments of Congress override conflicting provisions of international executive agreements irrespective of which came first in point of time."

[4] On remand from the Second Circuit with express direction to resolve the constitutional issue presented here. *New England Merchants National Bank* v. *Iran*, Nos. 80-6254-6349 (2d Cir. April 9, 1981).

ment claims that the President has exercised his "inherent" power to settle international claims, the source of this authority is not identified. The power of the President to conduct foreign affairs, while not an express power, is considered to be an implied power derived from his authority to appoint and receive foreign ambassadors,[5] and from the provision vesting executive power in the President. U.S. Const. art. II, §§ 1-3.

The Constitution vests Congress with express authority to "regulate commerce with foreign nations", U.S. Const. art. I, § 8, cl. 3,[6] and with the power:

> "[T]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and *all other* powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." U.S. Const. art. I, § 8.

Congress also possesses power to determine the jurisdiction of inferior federal courts. U.S. Const. art. I, § 8, cl. 2, and art. III, § 1. Any exercise of these combined powers by Congress with respect to foreign commerce or the presentation of commercial claims against a foreign state in federal courts may limit the assertedly "independent" authority of the President's power to "settle" foreign claims by executive agreement.

The tension between the exercises of executive and legislative power was recognized in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-38 (1952), where Justice Jackson (concurring) examined the extent

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[5] The power "to receive ambassadors" contained in Article II, § 3 has been criticized by constitutional scholars as a "flimsy" basis for conclusion of executive agreements settling international claims. R. Berger, *Executive Privilege: A Constitutional Myth* 153 (1974).

[6] In *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) 1, 86 (1824), the Supreme Court recognized that the power over foreign commerce ". . . is vested in Congress as absolutely as it would be in a single government".

to which the President's power may fluctuate as a result of an exercse of legislative power by Congress. Thus, Justice Jackson reasoned that where

> "[t]he President acts in the absence of either a Congressional grant or denial, he can rely only on his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority." *Id.* at 637.

However, when the President takes measures

> "[i]ncompatible with the expressed or implied will of Congress, his power is at at its lowest ebb, for then he can rely only upon his own constitutional powers *minus* any constitutional powers of Congress over the matter." *Id.* at 637-38.

In the area of foreign relations the President possesses broad, but not exclusive, power to act. The power to enter into executive agreements with foreign nations is shared concurrently with the power of Congress to regulate foreign commerce and to make all laws necessary and proper for execution of the functions of the Government. It is within the context of these limitations that the scope of the President's asserted power to "settle" international claims must be measured. Where, as here, Congress has enacted legislation establishing federal jurisdiction for resolution of commercial claims against foreign states, the President lacks constitutional authority either to "settle" such claims or to divest the federal courts of their jurisdiction to decide them.

B. Submission of claims against Iran to the jurisdiction of the federal courts under the FSIA deprives the President of authority to "settle" such claims by executive agreement.

The crucial separation of powers problem raised by the President's attempt through executive orders and implementing regulations to secure the suspension and ultimate termination of claims already within the jurisdiction of

the federal courts under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.* ("FSIA"), cannot be obfuscated by extravagant claims of executive power over foreign relations. In the FSIA Congress vested the federal courts with *in personam* jurisdiction over claims as to which a foreign state is not entitled to immunity, 28 U.S.C. § 1330(a). Congress gave federal courts the exclusive power to determine a foreign state's entitlement to sovereign immunity, and, where no immunity exists, the statute provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances". 28 U.S.C. § 1606.

The FSIA was intended to eliminate the influence of the executive branch in those cases where private parties were attempting to collect damages from foreign states based on commercial activities. Thus, the House Report specifically states:

> "A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the *foreign policy implications of immunity determinations and assuring litigants that these determinations are made on purely legal grounds and under procedures that insure due process.*"[7]

Under prior practice, the State Department was responsible for deciding whether a foreign state's claim of sovereign immunity from suit would be recognized, and, where the State Department decided to recognize such immunity, the litigation would be dismissed.[8] This process often led to unfairness to American citizens, and State Department

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[7] H.R.Rep. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6605 (hereinafter "FSIA House Report").

[8] *See, e.g., Ex Parte Peru*, 318 U.S. 578 (1948), where the Court reasoned that the State Department's determination of sovereign immunity must be accepted as a conclusive determination by our political branch of government.

representatives were among those who urged that the law was necessary:

> "To assure that American citizens are not deprived of *normal legal redress* against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would." [9]

One of the overriding concerns of Congress in enacting the FSIA was thus to "depoliticize" the process by which a foreign state's claim of immunity from suit was resolved.[10]

The agreement between the United States and Iran requires the "termination" of all pending litigation against Iran.[11] Executive Order 12294, issued by President Reagan on February 24, 1981, requires "suspension" of claims against Iran, except as they may be presented to the arbitral tribunal. 46 Fed. Reg. 14,111 (Appendix at A-52). Despite this change in terminology, it is clear that the Executive is seeking to withdraw pending cases from the jurisdiction that Congress conferred upon the federal courts in the FSIA, without the consent of the claimants.

In an effort to avoid the constitutional difficulties presented by its attempt to terminate pending litigation against Iran, the Government has relied upon two principal arguments. First, it is asserted that the executive agreement with Iran effects a change in substantive law which the courts are bound to apply. Second, it is claimed

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[9] *Hearings on H.R. 11315, Subcomm. on Administrative Law and Governmental Relations, House Comm. on Foreign Rel.*, 94th Cong., 2d Sess. 24 (1976) (hereinafter "1976 FSIA Hearings"), (Statement of Monroe Leigh, Legal Adviser, Dept. of State).

[10] *Jet Lines Services, Inc.* v. *M/V Marso El Hariga*, 462 F.Supp. 1165, 1170 (D.Md. 1978).

[11] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning Settlement of Claims by the Government of the United States of America and the Islamic Republic of Iran (Appendix at A-30).

that the FSIA "merely" codified the restrictive theory of sovereign immunity and, consequently, the grant of jurisdiction contained in that statute is simply irrelevant when the President, in the exercise of his "foreign relations" powers, deems it necessary to settle certain claims. Although these arguments have convinced the District of Columbia Circuit and First Circuit to uphold the Executive, these decisions are erroneous and must be reversed.[12]

In support of the proposition that the executive agreement with Iran changes substantive law, the Government relies upon the rule expressed in *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), that a treaty entered into after a judgment was rendered must, if constitutional, be given effect on appeal. This argument overlooks a basic distinction between *Schooner Peggy* and the cases affected by the Iranian accords. *Schooner Peggy* involved a treaty between the United States and France requiring mutual restoration of captured property, which was given effect on appeal to defeat a prior award of a French vessel as a "prize" to the American sailors who had captured it. The intervening treaty "positively change[d] the *rule* which govern[ed] the case," *id.* at 109-10, by determining rights to ownership of the vessel.

Unlike a treaty, the executive agreement with Iran has not received approval by Congress, and neither the Gov-

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[12] *American Int'l Group Inc., et al.* v. *Islamic Republic of Iran, et al.*, No. 80-1779 (D.C. Cir. June 5, 1981); *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority, et al.*, No. 80-1027 (1st Cir. May 22, 1981). These cases seem unduly influenced by the exigencies of obtaining hostage release. Hard cases make bad law. However compelling the Executive's commitment to order and to judicially defend the transfer of funds, any such action must be consistent with constitutional strictures. Moreover, approval of the transfer attempted here, merely because the obligation to return Iranian funds was obtained under duress, has no long-term beneficial effect for the United States. On the contrary, it makes the Executive, and in turn the American Government, exceedingly vulnerable to similar unlawful demands.

ernment nor any of the opinions purporting to apply *Schooner Peggy* to this situation identify what precise change in the substantive law applicable to the pending Iranian cases has occurred.

The courts in *American International Group* and *Chas. T. Main, supra,* both found that the agreement with Iran had "settled" those claims within the jurisdiction of the arbitral tribunal such that plaintiffs were unable to state a "claim on which relief could be granted". However, this conclusion appears to be no more than a restatement of the original contention that there has been a change in "substantive" law. As Judge Duffy observed in *Marschalk Company Inc., supra,* the only thing settled by the executive agreement with Iran was the "hostage crisis". Noting that the agreement with Iran merely transferred the resolution of pending claims from federal courts to an arbitral tribunal, without giving claimants anything of value,[13] he stated:

> "There is no settlement of a case where the adjudication of the rights of the parties is merely transferred to another forum". Slip Op. at 47.

In no sense does the executive agreement "moot" the controversy in this or any other pending case against Iran or effect a change in substantive law, such that *Schooner Peggy* would apply. A change of jurisdiction is merely a procedural change. *See Haney* v. *Chesapeake & Ohio Railroad Company,* 498 F.2d 987, 992 (D.C. Cir. 1974).[14]

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[13] Judge Duffy expressly rejected the argument that Iran's waiver of sovereign immunity and act of state defenses or its agreement to pay arbitral awards from the security fund constituted concessions where the defenses would have been unavailable in commercial litigation under the FSIA and plaintiffs had fully secured payment of any judgment by prejudgment attachment. *Marschalk,* Slip Op. at 46-47.

[14] This statement is true even where arbitration is involved. As [then] Judge Cardozo explained: "[A]rbitration is a form of procedure whereby differences may be settled . . . It vindicates by a

In those instances where the courts have applied a change in substantive law to a pending case, such change, whether it occurred as a result of legislative action or judicial interpretation, affected the merits of the underlying controversy between the parties.[15] This is not the case here.

Moreover, the Executive fails to identify the source of this claimed power to effect a change in "substantive law" sufficient to override the mandate of the FSIA, which provides:

> "The district courts *shall* have original jurisdiction . . . of *any* nonjury civil action against a foreign state . . . as to *any* claim for relief in personam with respect to which the foreign state is not entitled to immunity". 28 U.S.C. § 1330(a).

Nor has any authority been identified which would negate the rule that a foreign state not entitled to immunity, "shall be liable . . . to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

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new method *the obligation then existing*". *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N.Y. 261, 262, 130 N.E. 288, 290 (1921). *See also, Ames* v. *Merrill Lynch, Pierce, Fenner and Smith*, 567 F.2d 1174, 1180 (2d Cir. 1977); *Montana Power Co.* v. *F.P.C.*, 445 F.2d 739, 748 (D.C.Cir. 1970).

[15] *See, e.g., Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 589 (1972); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 415 (1972) [Challenges to constitutionality of statutes held moot when during the pendency of the suit the state legislature amended or repealed provisions under review]; *Hall* v. *Beals*, 396 U.S. 45 (1969) [Challenge to state's six-month residency requirement to vote dismissed as moot when election law was amended to require only two-months' residency]; *Gibbes* v. *Zimmerman*, 290 U.S. 326, 333 (1933) [Suit seeking to compel appointment of a receiver to liquidate bank assets dismissed after legislation was passed to require bank's liquidation]; *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 115-16 (1920) [Challenge to ICC's authority to order use of prescribed bills of lading dismissed when Congress enacted legislation setting forth new requirements concerning form of bills of lading].

In *Marschalk, supra,* the court expressly ruled that the President could not pursuant to an executive agreement take actions which limited the jurisdiction conferred on federal courts under the FSIA. (Slip Op. at 28). As the court pointed out, Congress in 1976 specifically refused to give the President the power

> "To enter into agreements with other nations which would circumscribe the jurisdiction of the United States courts over international commercial claims under the FSIA." *Id.* at 26.

The overriding intention of Congress to insulate commercial claims against foreign states generally from executive branch influence and the fact that Congress had eliminated a provision which would have made the FSIA's immunity provisions subject to future international agreements,[16] persuaded the court that any inherent presidential power over "foreign affairs" could not authorize the "suspension" of litigation sought by the United States. As the court reasoned:

> "It would be totally incongruous if Congress took away from the executive the power to dispose of certain lawsuits against foreign governments by 'suggestions of immunity' and yet intended to permit the same result by international executive agreements." *Id.* at 30.

These considerations convinced the court that the President's attempt to suspend claims pending before the federal courts constitutes a violation of the principles of separation of powers.[17]

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[16] *See* FSIA House Report at 10; *Marschalk, supra,* at 30-35.

[17] Similarly, the court in *Electronic Data Systems Corp. Iran* v. *Social Security Organization of the Government of Iran,* No. 3-79-218-F Slip Op. at 23 (N.D. Tex. June 7, 1981), found that the Executive lacked authority to prescribe a new rule of law "which had the effect of negating valid exercises of judicial power." *Contra, American International Group, et al.* (D.C.Cir.); *Chas. T. Main Int'l.* v. *Regan,* (1st Cir.), *supra.*

Despite the Government's assertions that the President's "foreign relations" power includes the authority to suspend jurisdiction under the FSIA, it is clear that the Executive has never previously perceived its power over federal litigation so broadly. In fact, in 1958 the State Department concluded that the President lacked the power to make an executive agreement with Norway to submit a case, which was then pending in the Court of Claims, to an international arbitral tribunal. *See* Memorandum, "Hannevig Case," July 18, 1958, MS, Department of State, file 211.5741-Hannevig, Christoffer/7-1858, *reprinted in* 14 Whiteman, Digest of International Law, 248-49 (1967) (hereinafter "14 Whiteman"). In that instance, the State Department reasoned that Hannevig, a Norwegian national, had a statutory right to proceed with his claim against the United States in the Court of Claims, noting:

> "The Department has consistently taken the position that *since Hannevig had the right to have his claim adjudicated in the Court of Claims . . . an adjudication before an international tribunal would not be warranted.*" 14 Whitman at 248-49.

As a matter of executive *authority*, the State Department expressed grave doubt

> "that the President has power to make an agreement, *without Senate consent*, to submit the Hannevig claim to an international arbitral tribunal." *Id.*

In the FSIA Congress has exercised its express constitutional powers over foreign commerce and the federal courts to vest the federal courts with jurisdiction over commercial claims against a foreign state. An executive agreement that purports to declare a new "rule of law", the effect of which is to prevent a coordinate branch of Government from exercising powers vested in it by the Constitution violates the principle of separation of powers

and cannot be enforced. *See, e.g., United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872).[18]

C. Judicial or legislative approval of prior international settlements does not support the Executive's claimed authority to implement the agreement with Iran.

The Government has attempted to place the agreement with Iran within the context of a "historical practice" of international claims settlement agreements. However, many of the authorities relied upon by the Government antedate the FSIA and their reasoning cannot be extended to the present situation. Two flaws in the Government's reliance on prior claims settlements are apparent. First, the Government fails to differentiate between the types of claims settled under the prior executive agreements and those involved here. Second, the Government fails to take into account the distinction between state and federal laws for the purpose of determining the domestic effect of an executive agreement under the Supremacy Clause.[19]

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[18] *See Marschalk, supra*, Slip Op. at 56-57. In the past the courts have refused to enforce international agreements which violate the principle of separation of powers. Thus, in *United States* v. *Guy W. Caps, Inc.*, 204 F.2d 665 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955), the court ruled that the President lacked authority to enter into an executive agreement with Canada that conflicted with the Agricultural Act of 1948. *See also Consumers Union of U.S. Inc.* v. *Rogers*, 352 F.Supp. 1319 (D.D.C. 1973), where the court struck down voluntary restraint arrangements among foreign steel companies, negotiated by the State Department, upon a finding that the agreement violated the Sherman Act.

[19] Under the Supremacy Clause an executive agreement can supersede inconsistent state law, but not federal law. Restatement § 144. *See, e.g.*, Ohly, *Advice and Consent: International Executive Claims Settlement Agreements*, 5 Cal.W. Int'l L.J. 271, 291: "The Supreme Court has not yet been presented with a situation in which an executive agreement entered into on sole authority of the President is claimed to supervene a prior congressional statute which has an *international* effect."

The Government has asserted that citizens' claims against Iran are "claims" of the United States and thus may be settled even without the consent of the claimant. However, the proposition that the claims of nationals against a foreign state belong to the United States, is based upon an assumption that under international law no remedy for such claims otherwise existed, and is no longer valid.[20]

With the enactment of the FSIA, the Executive's authority to settle "commercial claims" already committed to the courts disappeared. *Chas. T. Main Int'l., Inc.* v. *Khuzestan Water & Power Authority, et al.*, No. 80-1027, Slip Op. at 5 n. 5 (1st Cir. May 22, 1981) (concurring opinion). Thus, where a right to pursue a claim against a foreign government exists, the United States loses its ability to "settle" such claim over the objections of the claimant, at least without payment of just compensation. *Marschalk, supra,* at 61-63; *Chas. T. Main Int'l, supra,* Slip Op. at 5 n. 5 (concurring opinion).

A majority of the recent international settlement agreements negotiated by the United States have involved expropriation of the property of U.S. citizens abroad, for which there is still no recovery in the United States.[21]

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[20] *Ohly, supra,* at 279 n. 42. *See* Restatement § 174, Comment b, which provides: "A principle of traditional international law is that only states have rights under international law, and under international procedures persons have generally not had *standing* to initiate their own claims."

[21] The agreement between the U.S. and the Peoples Republic of China, T.I.A.S. 9306 (1979), is a case in point. The agreement provides for payment of $80.5 million as full and final settlement of "the claims of USA and its nationals . . . against the PRC *arising from any nationalization, expropriation, intervention, and other taking* of, or special measures directed against, property of nationals of the USA on or after October 1, 1949 and prior to the date of this agreement." Art. I(a). Similarly, the settlement with Egypt, 27 U.S.T. 4214, T.I.A.S. 8446 (1976) provides a lump-sum settlement for "nationalization or expropriation" (Art. II) and

Still other settlements furnished compensation for war claims or other losses for which recovery was not otherwise available.[22] The majority of the claims involved in prior settlements were *not* commercial claims such as those at issue here.[23] The enactment of the FSIA by providing citizens with a forum for resolution of those disputes, free from executive interference, precludes the United States, where that forum has been invoked, from disposing of those claims for foreign policy reasons.

This Court's earlier decisions regarding the President's power to conduct foreign relations do not support a reading of Article II which would authorize the executive branch to remove a citizen's claim from the jurisdiction of a federal court where it is properly pending. In *United*

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exempts private claims of U.S. nationals. The U.S.-Poland Claims Settlement, 11 U.S.T. 1953, T.I.A.S. 4545 (1960) covers claims for "nationalization, expropriations, debts owed by nationalized industries." The U.S.-Hungary Claims Settlement, 24 U.S.T. 522, T.I.A.S. 7569 (1973), provides for settlement of claims arising from debts, nationalization and other takings.

[22] *See, e.g., Z & F Assets Realization Corp.* v. *Hull*, 311 U.S. 470 (1941), providing for reimbursement of sabotage losses. *See also* Comment *"Self-Executing Executive Agreements: A Separation of Powers Problem"*, 24 Buffalo L.Rev. 137, 152 (1975).

[23] Indeed, it was not the practice of the United States to espouse the commercial contract claims of its nationals against foreign governments. 5 Hackworth, Digest of International Law, 611-12 (1943). A foreign state's failure to pay a private contract has not been considered a violation of international law and under prior law a claimant was generally without a remedy. Although the adoption of the "restrictive theory" of sovereign immunity by the State Department in 1952 was intended to afford United States claimants with the opportunity to adjudicate a commercial claim against a foreign state, the "right" to do so was often thwarted by the State Department's practice of granting immunity on political rather than legal grounds. *See* Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States*, 22 Bus. Law. 3 (1966).

States v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936), the Supreme Court in dicta suggested that the President had "inherent powers" to act in the field of international relations. While Justice Sutherland broadly described the President as "sole organ of the federal government" in foreign relations, he recognized that this inherent power "*like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.*" *Id.* at 320.

Nor will the Supreme Court's decisions in *United States* v. *Belmont*, 301 U.S. 332 (1937) and *United States* v. *Pink*, 315 U.S. 203 (1942) support the result sought by the Government here. *See Electronic Data Systems*, *supra*, at 22. In *Belmont* the Court ruled that the President had authority to conclude an executive agreement providing for recognition of the Soviet Union, for settlement of claims by the United States and enforcement by the United States of Soviet nationalization decrees. The Court rejected the claim of a U.S. banker that the Litvinov Assignment, by which the United States became successor to the nationalized Soviet property, including the confiscated bank accounts of a Russian corporation, constituted a taking of private property without just compensation. In so ruling, the Court made clear that rights of U.S. citizens were not at stake and that the dictates of the Fifth Amendment were inapplicable to the actions of a foreign government. 301 U.S. at 322.

Four years later in *Pink*, the Court again decided a case involving the settlement of claims and the domestic effect of the Litvinov Assignment. In *Pink*, the Court expressed its view that the "power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President." 315 U.S. at 223. The Supreme Court thus reasoned that a New York court's decree attaching the funds of a nationalized Russian corporation for the benefit of foreign

creditors did not defeat the superior right of the United States to vest those funds for the benefit of its citizens.[24]

The expansive view of presidential authority in *Belmont* and *Pink* does not support the Government's argument that an executive agreement can prevent American citizens from having their claims resolved by federal courts. Both *Belmont* and *Pink* involved the issue of whether an executive agreement settling international claims could prevail over contrary state law.[25] Thus, the result in both *Belmont* and *Pink* was founded on the Supremacy Clause,[26] and neither case supports the view that the Executive possesses an inherent power to deprive U.S. citizens of their claims against Iran or to divest a federal court of jurisdiction properly invoked under the FSIA.

II. The President Lacks Statutory Authority To Order The Suspension Of Jurisdiction Or The Nullificaton Of Attachments Obtained Under The FSIA.

The preceeding section demonstrates that the President's constitutional authority does not provide a sufficient basis for the enforcement of the executive orders

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[24] The creditors who had attached the funds involved in *Pink* were not U.S. citizens, nor did their claims arise out of the nationalized Russian corporation's transactions in New York. Two factors convinced the Court that the Litvinov Assignment should be enforced. *First*, the Court reasoned that the Fifth Amendment did not preclude the United States from securing priority for its nationals as against the claims of creditors from foreign countries; *second*, under the Supremacy Clause the Court reasoned that state law must yield when it is inconsistent with the provisions of a treaty or international agreement. 315 U.S. at 231.

[25] *Marschalk*, *supra*, at 48-50; *Electronic Data Systems*, *supra*, at 22-23. *See* Ohly, *supra*, at 282 n. 5.

[26] *Missouri* v. *Holland*, 252 U.S. 416 (1920), often cited by the Government for the proposition that a claims settlement can annul pending "domestic litigation" merely held that a treaty can supersede conflicting state laws, and thus has no application here.

seeking to implement the international agreement between the United States and Iran.[27] This portion of the brief will show that the President lacks statutory authority to deprive a federal court of jurisdiction in a suit properly brought under the FSIA or to nullify a prejudgment attachment issued by such court.

A. The IEEPA does not authorize the President to suspend prosecution of claims against Iran.

The International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* ("IEEPA"), authorizes the President to regulate international economic transactions when this country is confronted with a declared national emergency arising from "any unusual or extraordinary threat [from exterior forces] . . . to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701. The Act povides that when the President declares a national emergency, he may, *inter alia:*

> [I]nvestigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest. 50 U.S.C. § 1702.

President Carter invoked his powers under this statute on November 14, 1979, when he issued Executive Order No. 12170 "blocking" Iranian assets subject to the jurisdiction of the United States. The Secretary of the Treasury thereafter promulgated regulations barring "transfer" of Iranian property, and authorizing "judicial proceedings" against Iran, 31 C.F.R. § 535.504(a), 44 Fed.Reg. 67,619 (1979).

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[27] For the reasons set forth in Section I, *amici* contend that the Executive lacks constitutional authority to "nullify" prejudgment attachments of foreign property as part of a "claims settlement". *See Marschalk, supra,* at 68 n. 24.

Executive Order 12294 purports to suspend and deny legal effect to all claims against Iran for *equitable* or *other judicial* relief except as they may be presented to the arbitral tribunal, and to transfer to the tribunal authority to make final determinations on the merits of such claims. (Appendix at A-52). In commencing this action, claimants invoked the jurisdiction conferred upon the district courts by Congress under the FSIA. The IEEPA gives the President no authority to regulate the rights of parties or the power of courts to adjudicate claims in domestic litigation.

The IEEPA was enacted in 1977 to limit the exercise by the President of emergency powers under Section 5(b) of the Trading With The Enemy Act ("TWEA"). The focus of the President's restricted national emergency authority was to be, as the House Report acknowledges, "clearly limited to the regulation of *international economic transactions.*" [28] The primary weapon at the President's disposal under the statute was the blocking of foreign assets.[29] Neither the statute nor its legislative history suggests that Congress, merely by enacting this legislation, intended to give the President, as an *incident* of his authority to limit international economic emergencies, the power to interfere with federal jurisdiction over claims against a foreign state as to which a national emergency had been declared.

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[28] H.R. Rep. No. 459, 95th Cong., 1st Sess. 1 (1977) (hereinafter "IEEPA House Report").

[29] As examples of the transactions to be regulated by the President, the Senate Report lists the following:

> "Foreign exchange transactions, transfers of credit or payments between banking institutions where a foreign interest is involved, import or export of currencies, and to control or freeze property transactions where a foreign interest is involved."

S.Rep. No. 466, 95th Cong., 1st Sess. 5 (1977), *reprinted in* [1977] U.S. Code Cong. & Ad. News 4540, 4543 (hereinafter "IEEPA Senate Report").

The President's asserted authority to regulate the claims of U.S. nationals is based on the erroneous notion that such claims are "property" in which Iran has an interest.[30] As Judge Duffy recently observed in *Marschalk*, such characterization is a vain endeavor by the Government to fit

> "[Plaintiff's] claim into one of IEEPA's pigeon holes which would render it amenable to regulation by the President." Slip Op. at 18.

The opinion in *Marschalk* points out two major flaws in the Government's position. First, the court noted, a citizen's claim or contract right is not the type of "property" that Congress intended the President to regulate under IEEPA, because that statute was concerned primarily with tangible assets of foreign states.[31] Second, the court reasoned, the only party that has an interest in the plaintiff's claim or contract rights was the plaintiff. While the court reasoned that the Iranian defendants had an interest in defending against the contract claim, it properly found that such an interest was not "property". *Id.* at 20.

The view that the IEEPA does not authorize executive interference with litigation commenced under the FSIA has been shared by the overwhelming majority of federal courts that have been confronted with the issue.[32] This

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[30] *See, e.g., Chas. T. Main Int'l, supra*, Slip Op. at 5 n. 5 (concurring opinion).

[31] As the court in *Marschalk* observed: "It is clear from the legislative history the *types* of property over which the President has power include only securities and other tangible properties situated in the United States." (Slip Op. at 19) (citing IEEPA H.Rep. at 15).

[32] For example, in *Electronic Data Systems, supra*, Judge Porter ruled that the IEEPA does not authorize nullification of congressionally mandated jurisdiction. (Slip Op. at 21). *See also, American Int'l Group, supra; Chas. T. Main, supra.* The court in *National Airmotive Corp.* v. *Government of Iran*, 499 F.Supp. 401, 405 (D.D.C. 1980), flatly rejected the Government's argument that a

reading of the IEEPA is consistent with the legislative history of that statute as well as prior decisions under Section 5(b) of the TWEA. Under the TWEA the courts have consistently held that litigation resulting in judicial determination of rights between a creditor and an alien debtor is compatible with freezing controls so long as the judgment did not purport to transfer title or effect payment out of blocked funds.[33]

In *Vishipco Line* v. *Chase Manhattan Bank*, No. 77-1251 (S.D.N.Y. Nov. 3, 1978), a case decided under the TWEA, the court specifically rejected the argument that the blocking regulations applicable to South Vietnam deprived a federal court of its diversity jurisdiction to determine the claims of Vietnamese corporations to bank accounts held by the Saigon branch of an American bank.[34] Examining the legislative authority under which plaintiff's assets were

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Treasury regulation, 31 C.F.R. § 535.504, by prohibiting the entry of judgment also precluded the court from making any determination of substantive legal rights in cases involving Iran, noting:

> "A bar on judicial consideration of plaintiff's claims on the basis proposed by the government would legitimize an attempt on the part of the Executive Branch, through Treasury regulations, to limit the jurisdiction of the federal courts. . ."

[33] *See, e.g., Orvis* v. *Brownell*, 345 U.S. 183 (1953); *Zittman* v. *McGrath*, 341 U.S. 446, 457 (1951); *Propper* v. *Clark*, 337 U.S. 472 (1949); and *Ferrara* v. *United States*, 424 F.Supp. 888, 890 (S.D. Fla. 1976).

[34] The regulation at issue in *Vishipco*, 31 C.F.R. § 500.504, is virtually identical to § 535.504 of the Iranian Assets Control Regulations relied upon by the Government. As the *Vishipco* court interpreted it:

> "The prohibition of 31 C.F.R. § 500.504 against 'the entry of any judgment or of any decree' must be construed to forbid *only* those judicial acts that effect a transfer of interest in property. Since plaintiffs in the case at bar seek only to have their rights established so that their interests will be protected until they can secure a license or until the regulations are lifted, *the regulation is no impediment to the assumption of jurisdiction by this court.*" *Id.*

blocked, the court concluded that the TWEA made "no reference to the withdrawal of any jurisdiction from the federal courts." The court added:

> "There is a serious question whether the regulation in question would be a valid exercise of the power delegated by Congress if it were construed in the manner urged by Defendant."

As the foregoing discussion reveals, neither the IEEPA nor its predecessor the TWEA, authorized executive orders or implementing regulations which have the effect of preventing an adjudication of rights between a U.S. national and a foreign state as to which an emergency has been declared. Accordingly, the IEEPA does not provide the statutory authority to "suspend" litigation claimed by the Execuitve here.

B. The IEEPA does not authorize the President to nullify attachments issued by the courts pursuant to an express license.

The executive orders and Treasury regulations purport to "revoke all licenses for acquiring . . . any right . . . by court order, attachment or otherwise, including the license contained in Section 535.504" and to nullify "all rights" deriving from attachments obtained after November 14, 1979. 31 C.F.R. § 535. 218(a) and (b) (Appendix at A-74). The clear intent of these provisions is to retroactively deny legal effect to the prejudgment attachments issued by the federal courts during the period of blocking controls and to insulate the property of Iranian defendants from the liability to attachment that it would otherwise have upon termination of blocking controls. The Executive cannot, under the guise of "revoking" a license, deprive claimants of the rights in property that were created by an attachment order, issued by a federal court consistent with an express license.

This precise issue was considered at length in *Marschalk* where Judge Duffy ruled that the President's powers

under the IEEPA do not include the authority to nullify the rights in Iranian property obtained by a claimant who had obtained an attachment as permitted by the license contained in the regulations. Slip Op. at 68-69.[35] Reviewing the legislative history of IEEPA, Judge Duffy found that Congress gave the President authority to "control or freeze property transactions" only where a foreign interest is involved. Thus, he reasoned, executive action which had the effect of negating a property interest acquired by U.S. citizens pursuant to a "licensed" prejudgment attachment was not within the President's statutory authority. *Id.* at 70.

Judge Duffy found that even the TWEA which permitted the *vesting* of foreign property by the United States, would not have permitted the President to nullify attachment liens obtained by U.S. citizens in foreign property upon the termination of blocking controls, noting:

> "Neither the legislative history of TWEA nor any case falling under it indicate a presidential power to nullify a citizen's court-conferred rights in foreign property." *Id.*

In his analysis of the TWEA, Judge Duffy pointed out that the authority most often relied upon by the Government, *Orvis* v. *Brownell*, 345 U.S. 183 (1953), does not support the Executive's asserted power to nullify attachment liens obtained after the imposition of blocking controls. *Marschalk*, Slip Op. at 71.

In *Orvis* this Court held that a freeze order affecting Japanese property "recognized [plaintiff's] *attachment*

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[35] In *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, 502 F.Supp. 120, 123 (S.D.N.Y. 1980), Judge Duffy ruled that an attachment of Iranian assets obtained after the November 14, 1979 blocking order provided claimants with security for judgments and established priorities vis-a-vis individual claims in the event that the blocking controls were removed. *Accord, Behring Int'l Inc.* v. *Miller*, No. 80-2864, Slip Op. at 11 (D.N.J., Dec. 24, 1980).

liens insofar as they determined relationships between creditor and enemy debtor," 345 U.S. at 186-87, but that such liens did not create a property interest in blocked funds which the Alien Property Custodian was bound to recognize under § 9 of the TWEA.[36] *Orvis* did not hold that an attachment lien was a "nullity" or conditional as between the U.S. creditor and the alien debtor; rather it merely established that such an interest was insufficient to defeat the superior claim of the United States to the property. This distinction convinced Judge Duffy that an attachment lien on Iranian assets obtained during freezing controls remains valid, as against the Iranian property owner, and that the United States lacks authority to nullify rights derived from such attachment. *Marschalk,* Slip Op. at 70-72.

The more limited presidential powers to deal with foreign property contained in the IEEPA indicate that the Government's reliance on *Orvis* is misplaced in another important respect. The attachment lien-holder's rights in *Orvis* were not invalidated vis-a-vis the alien debtor, they were merely found to be inferior to those of the Alien Property Custodian. This recognition of a superior right, however, was based upon the right of the United States to *possession* of the property under a *res* vesting order, prescribing that alien property be turned over to the custodian.[37]

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[36] Section 9 of TWEA authorized a non-enemy who claimed a right, title or interest in money or property that had been wrongfully *seized* by an Alien Property Custodian to file claims for a return of the *property,* or recovery of its full value. 50 U.S.C. App. § 9. Thus, the action seeks to place the claimant in the position of a creditor with a security interest in specific property.

[37] *See also, Zittman* v. *McGrath,* 341 U.S. 471 (1951) ("Zittman II"), where the Court construed the terms of *res* vesting, prescribing that certain attached bank accounts be "turned over . . . to be held, administered and accounted for as provided by law." In

However, under the TWEA, when the right to possession of blocked property was not involved, the United States did not have rights superior to those of an attaching creditor. Thus, in *Zittman* v. *McGrath*, 341 U.S. 446, 463-64 ("Zittman I"), this Court held that where the United States pursuant to a vesting order succeeded only to the "right, title and interest" of an alien debtor in vested property, an attachment lien obtained after a freezing program was in effect was valid as against the alien debtor and, thus, could not be declared a "nullity" as the United States had requested.[38]

The elimination in the IEEPA of the President's powers under § 5(b) of the TWEA to take custody of or seize foreign property further supports the conclusion that the nullification of attachments sought by the Executive cannot be sustained on the strength of prior rulings under the TWEA. In enacting the IEEPA, Congress revoked the President's authority to vest, seize, and *take custody* of foreign property during a declared emergency.[39] Thus, a broad range of Presidential options, not limited to the

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Zittman II the Custodian asserted that the "turnover order" gave him a right to possession of the funds notwithstanding the attachment, and in the Court's view the exercise of the power *to hold* the funds "in the interest of and for the benefit of the United States" was sufficient to transfer a right of possession. 341 U.S. at 473-74.

[38] In its decision in *American International Group*, Slip Op. at 20-23, the D.C. Circuit erroneously concludes that *Orvis* provides authority for the Government's attempt to nullify attachments. The Court's analysis of *Orvis* and *Zittman I* disregards entirely the difference in treatment accorded to attachment liens in situations where the United States asserted a right to *possession of* assets *(Orvis)* as opposed to merely succeeding to the *title* of the debtor *(Zittman I)*. The *AIG* Court's conclusion that the attachments in *Orvis* could be "disregarded" for all but jurisdictional purposes is, quite simply, wrong.

[39] The House Report stresses that IEEPA removes the authority of the President in time of national emergency to "vest any prop-

technical acquisition of title to property, was eliminated in § 1702 of the IEEPA.[40]

Not only were all former seizure provisions stricken from IEEPA,[41] but so, too, were the provisions authorizing the President to appoint an agent to take custody of and account for those assets.[42] The IEEPA contains no procedure whereby persons claiming a right, title or interest in wrongfully seized property can recover it from the Government. Again, every prior version of TWEA, *as well as its current enactment,* have balanced the extraordinary power to take possession of foreign assets with a specific mechanism enabling persons to challenge the improper exercise of that power.[43]

As the foregoing discussion reveals, the only power under the TWEA which in *Orvis* was deemed to give the United States rights superior to those obtained by attachment liens, the power to *seize* and hold foreign assets,

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erty or interest of any foreign country . . . *and to hold, use, administer, sell, or otherwise deal with 'such interest or property' in the interest of and for the benefit of the United States''*. IEEPA House Report at 2.

[40] This interpretation is confirmed by the legislative history of Section 5(b), as enacted in 1941. Both the House and Senate reports specify that Section 5(b) gives to the President "flexible powers, operating through such agency as he might choose, *to deal comprehensively with* the many problems that surround *alien property or its ownership or control in the manner most effective in each particular case.*" S.Rep. No. 911, 77th Cong., 1st Sess. (1941); H.R.Rep. No. 1507, 77th Cong., 1st Sess. (1941).

[41] Also withdrawn from the IEEPA, but included in the TWEA was Section 7(e), which since as early as 1917 served as the authorization for the President's power to seize enemy and foreign property. *See Steohr* v. *Wallace*, 255 U.S. 239 (1921).

[42] *See* 50 U.S.C. App. § 6 (1917, 1918, 1941, 1977). Every version of the TWEA from 1917 to the present has included such provisions to assure the proper administration of foreign property.

[43] *See* 50 U.S.C. App. § 9, 34 (1917, 1918, 1941, 1977).

was expressly excluded from the IEEPA. Accordingly, that statute and the rationale of *Orvis* cannot provide statutory basis for the claimed power of the President to "disregard" or nullify existing attachments.

Finally, the Government has asserted that American creditors who have obtained attachments of Iranian assets never possessed more than a "conditional" interest in those assets because such attachments depended upon revocable Treasury Department licenses. Once the licenses were revoked, it is asserted, the attachments also were nullified. *See, e.g.*, Memorandum in Support of Defendants' Motion to Dismiss, Appendix at A-99. This argument was rejected in *Marschalk*, where the court reasoned that even where a revocable license permits the acquisition of a property interest by attachment, the interest in property so created is not automatically "nullified" when the license is withdrawn. Slip Op. at 78-80.

Judge Duffy acknowledged that while the Executive had undisputed power to revoke the license to attach, such revocation merely prevented acquisition of future attachments, leaving undisturbed those rights in property previously obtained. In so ruling, the Court found the present situation analogous to those where a revocable license to mine land or graze livestock is issued and later revoked. Such revocation, it was noted, prevents future mining or grazing, but does not impair the licensee's right to keep what was already obtained while the license was in effect." As the court observed in *Marschalk*, the only *condition* in the license to attach Iranian assets was that it could be revoked and future attachments prohibited. *Id.* at 79-80.

" *Acton* v. *United States*, 401 F.2d 896 (9th Cir. 1968) *cert. denied*, 395 U.S. 945 (1969) (revocation of license to mine does not interfere with licensee's rights to minerals already mined); *United States* v. *Fuller*, 409 U.S. 488 (1973) (grazing license revoked without interfering with licensee's right to benefit from increased weight of livestock); *Price & Baker* v. *Madison*, 95 N.W. 933 (S.D. 1903) (revocation of license to cut timber does not interfere with licensee's right to keep timber cut but not removed before revocation).

The mere revocation of licenses authorizing attachment, however, can neither strip the existing attachments of their legal effect, nor deprive the creditors who obtained them of their property interest in Iranian assets.

C. The Hostage Act does not provide authority for the President's actions.

The Hostage Act of 1868, 22 U.S.C. § 1732 (1976), does not authorize the suspension of federal court jurisdiction or termination of attachments. In that Act, Congress merely intended to facilitate the release of American citizens detained abroad by clarifying the President's duty to exercise his existing executive power to secure their release. Cong. Globe, 40th Cong., 2d Sess. 4330, 4332 (1868) (remarks of Senator Williams). Essentially, the Act contemplates presidential use of "diplomatic or foreign-service consular" to fulfill this mandate. *Zemel* v. *Rusk*, 381 U.S. 1 (1965); *Redpath* v. *Kissinger*, 415 F.Supp. 566 (W.D. Tex.) *aff'd*, 545 F.2d 167 (5th Cir. 1976). The argument that the Hostage Act authorizes the executive actions in issue here was totally rejected in *Electronic Data Systems Corp.*, *supra* at 20, and by virtually every other court that has considered the issue.

III. The Executive Agreement With Iran Violates The Fifth Amendment.

Amici adopt the argument of Petitioner raised below that the executive agreement violates the Fifth Amendment by depriving claimants of their property rights without due process or payment of just compensation. As stated there, and as established in *Marschalk, supra,* the executive agreement and orders requiring transfer of claims and the dissolution of judicial attachments constitute a taking of property for a public purpose without guarantee of adequate compensation. Accordingly, even if the terms of the international agreement should be implemented, the United States is obliged to insure that those whose property has

been destroyed in the interest of our foreign policy objectives are appropriately compensated.

CONCLUSION

For the foregoing reasons, the Court should declare the executive agreement with Iran and the executive orders and regulations purporting to implement it to be invalid and leave undisturbed the attachment orders and jurisdiction of the federal courts over claims against a foreign state.

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No. 80-2078

IN THE

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OCTOBER TERM, 1980

DAMES & MOORE, a partnership,

Petitioner,

—vs.—

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

MOTION OF SYLVANIA TECHNICAL SYSTEMS, INCORPORATED FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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TABLE OF CONTENTS

	PAGE
Table of Authorities	i
Motion of Sylvania Technical Systems, Incorporated for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae*	1
Summary of Argument	7
Argument	8
POINT I — The Executive Branch May Not Take Property Without Assuring Just Compensation And Equal Protection Even In Carrying Out An International Agreement	8
A. Implementation Of The Executive Orders Without Further Protection For Plaintiffs Would Violate The Fifth Amendment Right To Just Compensation	8
B. Implementation Of The Executive Orders As Written Would Violate Equal Protection Rights	19
POINT II —If The Judicial Branch Gives Effect To The International Agreements, It Must Fulfill Constitutional Requirements By Holding That Plaintiffs Will Have Judicial Redress For Failure Of Arbitral Awards To Provide Just Compensation	21
Conclusion	29

Table of Authorities

Cases

American Int'l Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir., decided May 22, 1981) (opinion filed June 5, 1981) 8,26

	PAGE
Aris Gloves, Inc. v. United States, 420 F.2d 1386 (Ct. Cl. 1970)	13
Avramova v. United States, 354 F.Supp. 420 (S.D.N.Y. 1973)	16n
Armstrong v. United States, 364 U.S. 40 (1960)	9,12
Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948)	23
Becker Steel Co. of America v. Cummings, 296 U.S. 74 (1935)	18n
Behring International Inc. v. Miller 504 F. Supp. 552 (D.N.J. 1980)	11
Blagge v. Balch, 162 U.S. 439 (1896)	13
Boddie v. Connecticut, 401 U.S. 371 (1971)	20
Bolling v. Sharpe, 347 U.S. 497 (1954)	19
Buckley v. Valeo, 424 U.S. 1 (1976)	19
Cary v. Curtis, 44 U.S. (3 How.) 236 (1845)	22-23
Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921)	18
Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir., decided May 22, 1981)	8,9,28
Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 659 (1890)	26
Converse v. Highway Construction Co. of Ohio, 107 F.2d 127 (6th Cir. 1939)	24
Crowell v. Benson, 285 U.S. 22 (1932)	24n
Dames & Moore v. Atomic Energy Organization of Iran, No. CV79-0418 (C.D. Cal., decided Feb. 18, 1981)	23
De Malherbe v. Int'l Union of Elevator Constructors 476 F. Supp. 649 (N.D. Cal. 1979)	20n
Eastern States Petroleum Corp. v. Rogers, 280 F.2d 611 (D.C. Cir.), *cert. denied*, 364 U.S. 891 (1960)	24n
Electronic Data Systems Corp. Iran v. Social Security Organization of the Government of Iran, 508 F. Supp. 1350 (N.D. Tex.) *cert. denied*, 49 U.S.L.W. 3907 (June 8, 1981)	22-23
Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869)	23n

PAGE

Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869) 23n
Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 17n
Geofroy v. Riggs, 133 U.S. 258 (1890) 8
Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 23
Government Employees Ins. Company v. Le Bleu, 272 F. Supp. 421 (E.D. La. 1967) 24n
Gray v. United States, 21 Ct. Cl. 340 (1886) 8,12-14
Gregory v. Colvin, 235 Ark. 1007, 363 S.W.2d 539 (1963) 9n
Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 19
Hughes Aircraft Co. v. United States, 534 F.2d 889 (Ct. Cl. 1976) 28
In re Rubin, 242 F. Supp. 408 (E.D. Pa. 1965) 24
In re Tyler, 149 U.S. 164 (1893) 24
Joslin Mfg. Co. v. City of Providence, 266 U.S. 668, 677 (1923) 26
Juragua Iron Co. v. United States, 42 Ct. Cl. 99 (1907) 13
Lockerty v. Phillips, 319 U.S. 182 (1943) 23
Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) 9
Lynch v. United States, 292 U.S. 571 (1934) 8
Marschalk Company, Inc. v. Iran National Airlines Corp., et ano., 79 Civ. 7035 (S.D.N.Y., decided June 11, 1981) 10,17-18,18n,22,28
Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576 (N.D. Ill. 1936) 9n
National Airmotive Corp. v. Iran, 499 F. Supp. 401 (D.D.C. 1980) 8-9,11,17
New England Merchants Bank v. Iran Power Generation and Transmission Co.,, 502 F. Supp. 120 (S.D.N.Y. 1980) *remanded*, Nos. 80-6254-6349 (2d Cir., decided April 9, 1981) 15n
New England Merchants Bank v. Iran Power Generation and Transmission Co.,, 508 F. Supp. 49 (S.D.N.Y. 1980) 11
Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 19n

PAGE

North Am. Factors Corp. v. Motty Eitingon, Inc., 105 NY.S.2d 250 (Sup. Ct.), *aff'd*, 279 App. Div. 719, 108 N.Y.S.2d 338 (1951), *aff'd*, 304 N.Y. 901, 110 N.E. 2d 733 (1953) 9n
Oestereich v. Selective Serv. Bd., 393 U.S. 233 (1968) 24n
Orvis v. Brownell, 345 U.S. 183 (1953) 10,18n
Palmore v. United States, 411 U.S. 389 (1973) 23
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 26-27
Reid v. Covert, 354 U.S. 1 (1957) 8,12n,17n,25
Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944) 9n
Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955) 8,12,16n
Standard Oil Co. (New Jersey) v. Markham, 57 F. Supp. 332 (S.D.N.Y. 1944) 18n
Swift & Co. Packers v. Compania Columbiana Del Caribe, 339 U.S. 684 (1950) 9n
Uebersee Finanz-Korporation v. Markham, 158 F.2d 313 (D.C. Cir. 1946), *aff'd* 332 U.S. 480 (1947) 18n
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 8,12n
United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953) 16n
United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) 23
Unites States v. Kras, 409 U.S. 434 (1973) 20n
United States v. Dow, 357 U.S. 17, 21 (1958) 26
United States v. Pink, 315 U.S. 203 (1942) 15
United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) 17
United States v. Weld, 127 U.S. 51 (1888) 28
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 49 U.S.L.W. 4033 (Dec. 9, 1980) 9
Zittman v. McGrath, 341 U.S. 446 (1951) 18n

Constitutional Provisions:
United States Constitution, Article I, Section 9 ..... 19n
United States Constitution, Article III 11n,18,22,24n
United States Constitution, Article VI 22

PAGE

United States Constitution, Amendment V 8,15,18,19

Statutes, Executive Orders and Regulations:
28 U.S.C. §§1330, 1602 *et seq.* (1976) 15n,16
28 U.S.C. §§1491 *et seq.* (1976 & Supp. III 1979) 26-28
50 U.S.C. §1702 (Supp. I 1977) 18n
50 U.S.C. App. §5(b) (1976 & Supp. I 1977) 18n
Executive Orders 12276-85, 46 Fed. Reg, 7913-32 (1981) 3
Executive Order 12294, 46 Fed. Reg. 14,111 (1981) .. 3,10
31 C.F.R. §535.213 ..... 12n,14
International Agreements:
Declaration of the Government of the Democratic and Popular Republic of Algeria 2,4,10,28
Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran 2,10,19,28
Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, done August 15, 1955, 8 U.S.T. 899, T.I.A.S. 3853 (1955) 15n
UNCITRAL Arbitration Rules, United Nations Publications Sales No.: E.77.V.6 (1977) 3,9n,11n
Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria 2,15,19
Miscellaneous:
H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) 17n
Comment, *The Blocked Chinese Assets-United States Claims Problem: The Lump Sum Settlement Solution*, 3 Fordham Int'l L.J. 51 (1979-1980) 16n
Dean, *Amending The Treaty Power*, 6 Stan. L. Rev. 589 (1954) 15-16
Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498 (1974) 24n

PAGE

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953) 24n

Henkin, *Foreign Affairs and the Constitution* (1972) . 12n

Restatement (Second) of the Foreign Relations Law of the United States (1965) 12n

No. 80-2078

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Respondents.

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FOR THE NINTH CIRCUIT BEFORE JUDGMENT

MOTION OF SYLVANIA TECHNICAL SYSTEMS, INCORPORATED FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

Sylvania Technical Systems, Inc. ("Sylvania") hereby requests permission to file a brief *amicus curiae* in the above matter. Sylvania is an American corporation which, in June of 1977,

entered into a commercial contract with the Government of Iran to provide equipment and training in California and Iran for Iranian personnel in the management, maintenance and operation of certain electronic systems. Upon assuming power in Iran, the revolutionary government repudiated and terminated the contract with Sylvania, causing Sylvania to suffer damages in the amount of at least $21,040,000. On February 15, 1980, Sylvania filed suit in California Superior Court against the State of Iran and others for breach of contract, for an accounting and for certain declaratory and injunctive relief.

On February 20, 1980, the California Superior Court granted Sylvania an Order of Attachment directed against the property and assets of defendants in the amount of $21,040,000. Sylvania thereafter served writs of attachment on various third parties and thereby attached certain property and assets of defendants as security for any judgment which ultimately might be entered. On June 4, 1980, the action was removed to the United States District Court for the Northern District of California, where it currently is pending.

On January 19, 1981, in effectuating the release of the American hostages from Iran, President Carter entered into a series of agreements with Iran.[1] Under the terms of the agreements, the United States made a sweeping commitment

> to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained

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[1] These agreements included the Declaration of the Government of the Democratic and Popular Government of Algeria ("General Declaration"), the Declaration of the Government of the Democratic and Popular Government of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration"), and the Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria ("Undertakings"). Related escrow and technical agreements were signed on January 20, 1981.

> therein, to prohibit further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.
>
> (General Declaration, General Principles, ¶B).

President Carter signed Executive Orders 12276-85 dated January 19, 1981, 46 Fed. Reg. 7913-32 (1981) ("Carter Executive Orders") with a view to implementing the executive agreements with Iran. Certain of the orders purported to "nullify all attachments" of Iranian assets, as called for by the General Declaration, notwithstanding present or future attachment liens or judgment levies against those assets. At the time, several hundred lawsuits against Iranian defendants, of which Sylvania's action was typical, were pending in courts throughout the United States.

On February 24, 1981, President Reagan signed Executive Order 12294, 46 Fed. Reg. 14,111 (1981) ("Reagan Executive Order") which purported to suspend all claims "which may be presented to the Iran-United States Claims Tribunal." Suspension of any claim would terminate if the Tribunal determined that it did not have jurisdiction. Claims are to be "discharged" when the Tribunal either upholds or rejects them "on the merits" and the awards, if any, have been paid. The Reagan Executive Order, however, makes no provision in case of an inadequate award for compensating the private citizens whose claims and attachments have been taken. The applicable arbitration rules, prepared by the United Nations Commission on International Trade Law (UNCITRAL), lack fundamental procedural safeguards assured to litigants in U.S. federal court actions.

Executive Order Nos. 12279 and 12280 order persons holding funds or securities of Iran or its agencies, instrumentalities, or controlled entities, to transfer such property to the Federal Reserve Bank of New York. New regulations under these executive orders require such transfer under pain of criminal penalties prior to July 19, 1981. In addition, Executive Order No. 12281 orders persons holding Iranian property other than funds or

securities to transfer the same as directed by Iran, irrespective of whether the Tribunal subsequently accepts or rejects jurisdiction. Such direction presumably could come from Iran at any time. In addition, these executive orders purport to prohibit United States litigants from acquiring new interests in Iranian property now in the United States. There is therefore a substantial risk that judgments later obtained in the United States, by litigants such as Sylvania, on claims refused by the Tribunal could not be satisfied if the attachments are voided and Iranian assets transferred out of this country.

In arbitrating claims against Iran, it is contemplated that the Tribunal will administer a $1 billion fund. Whenever the fund falls below $500 million, Iran is supposed to replenish it. (General Declaration, ¶7). There is, however, no guarantee that Iran will replenish this fund. It is estimated that claims in the Southern District of New York alone amount to $1.3 billion, representing approximately one third of the $3 to $4 billion outstanding American claims against Iran. There is no assurance as to whether and when arbitral awards will be fully paid by Iran in the light of that nation's past conduct, including its flagrant and persistent flaunting of international law. Finally, the fact that the Executive is attempting to release from attachment $3 to 4 billion in Iranian assets now in the United States, thereby losing any leverage that it may possess in ensuring Iran's compliance with its obligations, emphasizes the acute inadequacy of the arbitral mechanism. Furthermore, certain claims are to be excluded from arbitration by the terms of Article II of the Claims Settlement Declaration, namely, those ". . . arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts".

In contrast to the dubious arbitral remedy afforded most American claimants, the Undertakings assured that Iran's debts to U.S. and foreign banks with syndicated loans were completely satisfied and established a $1.418 billion escrow fund for other bank claims. (Undertakings, ¶2A-B). The banks thereby were also freed from the burden of pursuing their claims in an

uncertain arbitral forum and from the necessity of any further litigation. Clearly there has been disparate treatment between the U.S. and foreign banks on the one hand and Iran's other U.S. creditors on the other hand, amounting to a denial of equal protection.

Various United States Courts of Appeal and District Courts have now issued opinions relating to the propriety of the various Executive Orders, regulations and Presidential actions. On June 11, 1981, this Court granted the Petition for a Writ of Certiorari Before Judgment in the above-captioned matter. Sylvania, like Petitioner, has a civil action pending in United States District Court, in which an order of attachment has been issued. It is virtually certain that Sylvania's action will be directly affected by this Court's decision in the instant case in view of the common questions which are involved. At the same time, it is believed that Sylvania's position differs in certain material respects from that of Petitioner, and that the presentation of Sylvania's position, as set forth herein, will be of assistance to the Court in the resolution of these matters.

The Office of the Solicitor General of the United States and intervenor Bank Markazi Iran have consented to the filing of Sylvania's *amicus curiae* brief, but Petitioner and intervenor the Atomic Energy Organization of the Government of Iran have declined to do so. Permission to file same also has been sought from intervenor Islamic Republic of Iran, but no decision has been reached by it.

For the foregoing reasons, it is respectfully requested that Sylvania be granted leave to file the following brief *amicus curiae*.

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SUMMARY OF ARGUMENT

A decision by this Court as to whether or not the President had authority to enter into the international agreements and to promulgate the executive orders and regulations pursuant thereto at issue in this case does not dispose of this matter. A valid treaty, executive agreement or order or federal regulation, could not, even if so intended, amend or abrogate the protections afforded by the Bill of Rights, specifically plaintiffs' rights to just compensation for property taken and to equal protection in the implementation of the Declarations. It should be noted that the Declarations themselves do not purport to preclude just compensation or equal protection. While the taking of damage claims and attachments for the public purpose of hostage release affected by the Declarations may be an international obligation of the United States, the Court must also respect plaintiffs' rights by assuring them just compensation for the taking and protection equal to that enjoyed by other claimants, namely the U.S. and foreign banks that were fully paid in January.

The wording of the executive orders and regulations does not assure that compensation to be received through arbitration will be "just" and in fact, does not assure that it will bear *any* relation whatever to the true value of the claims. Rather, the orders require only that compensation shall be whatever amount is decreed by the Tribunal, a body which has not yet been convened and which will have few, if any, of the fundamental safeguards guaranteed by the courts of the United States.

Despite the fact the Tribunal is free to award a minute fraction of the true value of any particular damage claim, the present executive orders would terminate the claim as soon as the award was paid. In such case, compensation for the taking of the claim and attachments would be less than "just" and protection less than "equal" to that afforded to those U.S. and foreign banks who were fully paid in January 1981. In order to insure the constitutionality of the actions of the Executive Branch at issue here, this Court must act to preserve claimants' constitutional rights.

ARGUMENT

POINT I

The Executive Branch May Not Take Property Without Assuring Just Compensation And Equal Protection Even In Carrying Out An International Agreement

A. Implementation of the Executive Orders Without Further Protection for Plaintiffs Would Violate the Fifth Amendment Right to Just Compensation.

Although the Executive has broad power in the area of foreign affairs, such power is not unlimited. "Of course, like every other governmental power, [it] must be exercised in subordination to the applicable provisions of the Constitution." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). More specifically, the President's power to negotiate executive agreements, including claims settlements, is in no way exempt from this fundamental principle. *See Reid v. Covert*, 354 U.S. 1, 16-18 (1957); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

The Fifth Amendment to the U.S. Constitution assures that private property may not be "taken" without due process and then only for a public purpose and upon payment of "just compensation". Plaintiffs' claims against the Iranian government defendants, for which they seek to recover damages, constitute property entitled to the protection of the Fifth Amendment due process and eminent domain clauses. *See, e.g., Lynch v. United States*, 292 U.S. 571 (1934) (Brandeis, J.); *National Airmotive Corp. v. Iran*, 499 F.Supp. 401, 407 (D.D.C. 1980); *Seery v. United States*, 127 F.Supp. 601 (Ct. Cl. 1955); *Gray v. United States*, 21 Ct. Cl. 340 (1886). The crucial fact is that these plaintiffs, including Petitioner and Sylvania, and not the United States, are the owners of the present lawsuits. On the other hand, the United States Government has argued and the First Circuit and District of Columbia Circuit Courts of Appeal have agreed that the United States has settled all claims against Iran and that these claims no longer have any legal effect in United

States courts. *Chas T. Main Int'l Inc. v. Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir., decided May 22, 1981). *American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779 (D.C. Cir., decided May 22, 1981) (opinion filed June 5, 1981). The liquidated value of each lawsuit at present is unknown, just as the value of the compensation to be provided by arbitration is unknown. That which must now be provided is a mechanism for or assurance that the latter value will equal the former.

Moreover, the attachment orders obtained by plaintiffs also constitute a property right[2] which must be accorded protection. *See e.g., Armstrong v. United States*, 364 U.S. 40, 44 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *National Airmotive Corp. v. Iran, supra*, 499 F.Supp. at 407. *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 49 U.S.L.W. 4033 (Dec. 9, 1980). The implementation of the executive orders and the Treasury regulations aimed at invalidating the attachment orders and effectively eliminating access to the courts would constitute a taking of property since just compensation has not been assured and thus would directly violate the Fifth Amendment.[3] The Government's argument, as set forth in the Memorandum for the Respondents at 11 and asserted throughout these litigations, that revoking the license to attach simply revokes the attachments as well, is tantamount

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[2] *See generally Martinez v. Fox Valley Bus Lines*, 17 F.Supp. 576 (N.D. Ill. 1936); *Gregory v. Colvin*, 235 Ark. 1007, 363 S.W.2d 539 (1963); *North Am. Factors Corp. v. Motty Ettingon, Inc.*, 105 N.Y.S.2d 250 (Sup. Ct.), *aff'd*, 279 App. Div. 719, 108 N.Y.S.2d 338 (1951), *aff'd*, 304 N.Y. 901, 110 N.E.2d 733 (1953); *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372 (1944).

[3] In *Swift & Co. Packers v. Compania Columbiana Del Caribe*, 339 U.S. 684, 697-98 (1950), Justice Frankfurter observed that it was improper to relegate an American plaintiff to a foreign tribunal without assuring that the foreign defendant would provide security equal to that which had been obtained by attachment in American courts. The Tribunal is to administer a $1 billion fund, which represents approximately one third of the $3 to $4 billion outstanding claims against Iran. Clearly the standards envisaged by Justice Frankfurter are not being met in terms of security to satisfy an award, not to mention the serious procedural deficiences in the UNCITRAL Arbitration Rules, United Nations Publication Sales No.: E.77.V.6 (1977), as compared with civil procedures (including discovery) in U.S. District Courts. *See* n.4 *infra* at 11.

to revoking a license to cut trees on government land and then demanding the return of trees validly cut under the license. *Orvis v. Brownell*, 345 U.S. 183 (1953) is not to the contrary, for the reasons set forth by Judge Duffy in *Marschalk Company, Inc. v. Iran National Airlines Corp., et ano.*, 79 Civ. 7035 (S.D.N.Y., decided June 11, 1981) ("*Marschalk v. Iran*") at 70-2, which answer the points made by the First Circuit in *Chas. T. Main, supra*, at 10-12.

The Claims Settlement Declaration, Art. I, provides that plaintiffs not barred by Iranian forum selection clauses may either settle their disputes or seek arbitration. The arbitration mechanism provides that a one billion dollar fund to satisfy claims be established to be replenished by Iran whenever the fund falls below $500 million. (General Declaration, §7). There is no guarantee that Iran will meet this obligation. In view of the fact that the Treasury regulations attempt to dissolve the attachments and to order the transfer of $3 to $4 billion in attached Iranian assets in this country, it is highly unlikely that the United States will retain any substantial leverage to insure that Iran satisfies its obligation to replenish the fund.

The possibility of plaintiffs obtaining just compensation for their claims through arbitration must be considered even more tenuous in light of the cryptic clause employed in defining the jurisdiction of the International Arbitral Tribunal. Article II of the Claims Settlement Declaration excludes from arbitration "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position." While the Reagan Executive Order permits a plaintiff's United States court action to be reactivated upon a determination by the Tribunal that it lacks jurisdiction, it does not restore to the U.S. courts the attached assets that make the action valuable. Without the attachment, there is no reason to believe that a favorable judgment could be enforced, since the Iranian assets would have been transferred out of this country. Plaintiffs understand that the proposed transfer of assets is part of the hostage release package, but do not intend to pay more than U.S. citizens generally for the

hostages' return by accepting less than just compensation for their property.

No assurance is given by the Reagan Executive Order of just compensation in case an arbitration award is clearly in an amount less than the value of the claim. However outrageously low an award, once it is paid the claimant is finally barred from U.S. courts.

It is clear that the Executive's action in voiding the court attachment orders, suspending judicial proceedings, relegating claimants to a highly uncertain arbitration tribunal[4] and using the attached assets to settle the United States' differences with Iran constitutes a taking of plaintiffs' property such as to require compensation. *Behring International, Inc. v. Miller,* 504 F. Supp. 552, 558 (D.N.J. 1980) ("Even if said funds were ultimately utilized by the government in obtaining the release of the hostages, this court can envision no circumstances under which the plaintiff would not be entitled to compensation from the government."); *New England Merchants Bank v. Iran Power Generation and Transmission Co.,*, 508 F.Supp. 49, 51 (S.D.N.Y. 1980) ("Although these rights may not now be fixed and certain, they still are rights in property. As a result, the cancellation of these rights by the executive department may only be accomplished by due process of law." (footnote omitted); *see National Airmotive Corp. v. Iran, supra,* 499 F.Supp. at 406 n.10 ("Finally, the United States always retains the option of spending tax funds in pursuit of its foreign policy objectives, as distin-

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[4] The structure and procedures of the International Arbitral Tribunal fall far short of the minimal guarantees of due process provided in the United States Constitution. The Tribunal probably will be composed of a number of separate panels, each of which will hear the claims against Iran. Each panel will be composed of one Iranian designee, one American designee and one member chosen by agreement between the two sides. The Tribunal thus fails to guarantee an impartial decision maker as envisioned by the Constitution. *See* U.S. Const. art. III, §1.

Moreover, the Tribunal, which is to conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), (a) is not obliged to permit cross examination; (b) may apply whatever rules of evidence it sees fit; (c) must function *in camera* despite the objection of one party; (d) does not provide discovery of right; and (e) does not provide a right of appeal. *See* UNCITRAL Arbitration Rules, *supra.*

guished from private funds or claims to private funds where its authority is much more limited."). *See Armstrong v. United States, supra,* 364 U.S. at 49 (government's destruction of value of lien held to be a "taking").

Constitutional protections are not vitiated merely by the involvement of a foreign state or the existence of an intergovernmental executive agreement. *See, e.g., Seery v. United States, supra,* 127 F.Supp. at 606 (plaintiff's right to sue in United States courts not extinguished by executive agreement with Austria); *Gray v. United States, supra,* 21 Ct. Cl. at 393 (United States Government's cancellation of claims against France considered "the taking of private property for public use without just compensation"). While it is not disputed here that the Executive has the power to settle such claims, it may not exercise that power without insuring constitutionally adequate compensation.[5]

There is no legal precedent for the Government's contention in the various federal court actions that the Executive's general control over the disposition of foreign claims immunizes the Government from liability for a Fifth Amendment taking. All of the cases in which a claimant was denied compensation arose out of situations far different from the one confronting this Court. Thus, in *Gray v. United States,* 21 Ct. Cl. 340 (1886), one

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[5] "Nothing in the Constitution suggests that the rights of individuals in respect of foreign affairs are different from what they are in relation to other exercises of governmental power." L. Henkin, *Foreign Affairs and the Constitution* 252 (1972). This observation has been borne out by case law. The teaching of *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 320 (1936), is only that the Executive is less limited by the necessity of Congressional authorization in the foreign relations area; it is never free from the strictures of the Constitution. Moreover, the *Curtiss-Wright* Court specifically observed that executive power in foreign affairs is in fact subordinate to other constitutional provisions. 299 U.S. at 320. All treaties are thus subject to the Constitution. *See Reid v. Covert,* 354 U.S. 1, 17 (1957) (plurality opinion), in light of which the following formulation from the Restatement (Second) of the Foreign Relations Law of the United States (1965) §213, comment, seems to be accurate only in the most literal sense:

> A question that has not been definitively settled is whether a settlement by the United States for less than the full value of the claim [against a foreign state] may constitute a taking of property from the injured party that entitles him to compensation under the Fifth Amendment to the Constitution.

of the "French Spoliation Claims Cases," the Court of Claims held that settlement of claims by the United States of its nationals against France for seizure of United States ships in return for France's renunciation of certain claims against the United States for treaty violations created a right to compensation under the Fifth Amendment. The Court of Claims held:

> That any Government has the right to [settle claims of its citizens against a foreign state], as it has the right to refuse war in protection of a wronged citizen, or to take other action, which, at the expense of the individual, is most beneficial to the whole people, is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given him.

Id. at 392-93.

The validity of the holding in *Gray* was not undercut by *Aris Gloves, Inc. v. United States*, 420 F.2d 1386 (Ct. Cl. 1970), in which the Court of Claims denied Fifth Amendment compensation to the claimant when its property, located in Germany during World War II, was released to the U.S.S.R. as a result of the Potsdam Agreement. In denying the claim, the Court relied on a prior decision, *Juragua Iron Co. v. United States*, 42 Ct. Cl. 99, 111-12 (1907), which also involved a wartime appropriation of privately owned property. It was there held that property found in enemy territory was considered enemy property, regardless of the owner's nationality. In deciding against the *Aris Gloves* claimant, the Court of Claims distinguished the *Gray* decision, citing its advisory nature and dictum of the Supreme Court in *Blagge v. Balch*, 162 U.S. 439, 457 (1896), that the payments prescribed to be made in *Gray* were not based on any right of the claimants.[6]

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[6] "We think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace and not of right." 162 U.S. at 457. It should be remembered that Congress had passed a special statute authorizing the Court of Claims to hear the French Spoliation Claims Cases but did not authorize entry of final judgment.

Judge Nichols, in his concurring opinion in *Aris Gloves*, thoroughly analyzed the *Gray* case, including those factual elements in it which distinguished it from *Aris Gloves*. As Judge Nichols explained:

> It appears to me that to satisfy the *Gray* court, plaintiff here would have had to show as a minimum (a) that the acts of the USSR in seizing United States owned plants in East Germany as "reparations" were contrary to international law, (b) that the USSR's authorities would sooner or later have acknowledged the fact and paid compensation to the United States owners, and (c) that the United States representatives at Potsdam knowingly surrendered this possibility of compensation in return for concessions by the USSR in unrelated areas. Plaintiff has not even demonstrated proposition (a), still less the others.

420 F.2d at 1396-97.

Judge Nichols thus summarized the requisites for a "taking" compensable under the Fifth Amendment. These requisites essentially are: (a) a valid cause of action; (b) the assurance of eventual compensation; and (c) the Government's compromise or settlement of the cause of action for a purpose (such as release of the hostages) unrelated to the merits of the claim. This analysis is supported by the Restatement (Second) of the Foreign Relations Law of the United States:

> The question whether the United States must pay a national of the United States for waiving, or settling for less than full value, his claim for injury by a foreign state may arise in situations where the government may determine that other factors, such as political considerations, affecting the relations of the United States with the foreign state, call for a settlement less favorable to the United States than it would seek if it were concerned only with the economic considerations arising out of the claim and similar claims of other United States nationals.

Id. at § 213, Reporter's Note.

All three requisites exist in the case before this Court as well as in the many similar cases, including Sylvania's, currently pending in the federal courts. Before the Government's "settlement", plaintiffs had valid commercial causes of action against Iran or its agencies or instrumentalities[7] and all plaintiffs with valid attachments were assured of payment to the extent of those attachments. Finally, the Government clearly entered into the Declarations for numerous reasons wholly unrelated to a settlement of the claims on the merits.[8]

In *United States v. Pink*, 315 U.S. 203 (1942), the Court recognized that the Fifth Amendment was a limitation upon the operation of the Litvinov Assignment, an executive agreement recognizing the Soviet government and permitting the United States to seize assets in the United States nationalized by the Soviet Union and to use them to pay claims of U.S. citizens in preference to claims of foreigners. In the *Pink* case, the Court held that creditors of a Russian corporation, who were not citizens of the United States and whose claims did not arise out of transactions in the United States, could not challenge the Soviet nationalization of assets of its citizens or the Litvinov Assignment itself. *Id.*, at 226-227. The Court specifically found, however, that all claims of United States citizens against the Soviet fund had been satisfied and held that the United States

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[7] Under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§1330, 1602 *et seq.* a foreign state may not claim immunity from suit when, *inter alia*, a foreign state defendant has engaged in commercial activity. 28 U.S.C. §1602, 1605(a)(2). As the District Court for the Southern District of New York observed in *New England Merchants Bank v. Iran Power Generation and Transmission Co.*,, 502 F. Supp. 120, 123 (S.D.N.Y. 1980), *remanded*, Nos. 80-6254-6349 (2d Cir., decided April 9, 1981): "There is no question that the instant actions, bar none, are commercial in nature. Indeed, appellees seek monetary damages for alleged civil wrongs ranging from the nationalization and/or conversion of personal property in Iran to the repudiation and breach of various and sundry executory contracts." *See also id.* at 132. Thus, regardless of whether appellants may claim immunity from prejudgment attachment under the 1955 U.S.-Iran Treaty of Amity, Economic Relations and Consular Rights, 8 U.S.T. 899, T.I.A.S. 3853 (1955), there is no question that they may not claim immunity from suit.

[8] Indeed, the favored teatment received by some U.S. plaintiffs—namely the banks—attests to the relative unimportance the Government placed on notions of equity as applied to individual plaintiffs.

could constitutionally prefer its own citizens over foreign nationals in the settlement of claims. *Id.*, at 228. *See* Dean, *Amending the Treaty Power*, 6 Stan. L. Rev. 589, 605 (1954). There is a clear distinction between a holding that the President constitutionally can give effect to a Soviet decree confiscating property of Soviet citizens without compensation and a holding that the President of the United States can confiscate property of American citizens without compensation. The latter proposition is palpably unconstitutional, and *Pink* does not support it.

Unlike the pre-1976 precedents cited by the Government in its various submissions to the federal courts in which these cases are pending,[9] the pending cases indisputably involve judicially cognizable claims secured by valid prejudgment attachments.[10] Since the passage of the FSIA, the Executive Branch may no longer argue that foreign claims are contingent in nature, subject to unrestricted compromise by the United States in furtherance of its foreign policy objectives. As 28 U.S.C. § 1602 unambiguously provides:

> Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States *in conformity with the principles set forth in this chapter.* (emphasis added).

Sylvania does not argue that the United States is powerless to enter into a settlement of foreign claims held by United States

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[9] Even the most recent settlement cited by the Government, between the United States and the Peoples Republic of China, settled claims that had arisen prior to the FSIA. Comment, *The Blocked Chinese Assets-United States Claims Problem: The Lump Sum Settlement Solution*, 3 Fordham Int'l L.J. 51 (1979-1980).

[10] Many of the cases relied upon by the Government are thus inapposite. For example, the reasoning of *Avramova v. United States*, 354 F. Supp. 420 (S.D.N.Y. 1973), is inapplicable since the *Avramova* court based its reasoning on the fact that adjudication by a claims commission does not create a vested right. Plaintiffs herein do have vested rights in litigating their claims and in security for their claims in their orders of attachment. *See also Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955) (an executive agreement between the United States and Austria could not abrogate the plaintiff's right to just compensation following a governmental taking); *United States v. Guy W. Capps, Inc.*, 204 F. 2d 655, 660 (4th Cir. 1953) (executive agreements may not conflict with prior statute or treaty).

citizens. It only asserts that the implementation of such a compromise requires the United States to provide valid compensation and this Court to exercise its powers to see that this is accomplished. Any *statutory* support for the suspension of claims, if such existed, could not diminish the applicable *constitutional* requirements.

The sole precedent relied upon by the Government for its position that the Executive may abrogate the jurisdiction of the courts by executive agreement is the *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). *Schooner Peggy* is a 180 year-old case decided before the development of constitutional and statutory rights accorded United States citizens today. Moreover, *Schooner Peggy* involved the return of a prize of war pursuant to a treaty with France. This contrasts strongly with the present situation, in which creditors are being deprived of a forum by an executive agreement which attempts to intrude on the power of the judiciary.

The established right of a litigant to obtain and enforce an adjudication from a United States court[11] is supported by the FSIA,[12] which provides a comprehensive procedure for obtaining a judgment against a foreign state. Given the express grant of jurisdiction in the FSIA, this Court should not find an implied abrogation of that grant in a delegation of certain powers to the Executive that do not on their face deal with judicial process. *National Airmotive Corp. v. Iran, supra*, 499 F.Supp. at 405, in which the American plaintiffs' constitutional right of access to

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[11] *Reid v. Covert*, 354 U.S. 1 (1957) (attempt by Executive and Congress to transfer jurisdiction over civilians to military tribunal held unconstitutional); *Ex Partè Milligan*, 71 U.S. (4 Wall.) 2 (1866) (executive attempt to eviscerate civilian's right of recourse to federal civil courts rejected).

[12] Significantly, Congress sought in the FSIA to preclude the intrusion of "diplomatic influences" of the type involved in the Declarations:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, *thereby reducing the foreign policy implications* of immunity determinations and assuring litigants that these often crucial decisions are made *on purely legal grounds and under procedures that insure due process.*

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7 (1976) (emphasis added). In the instant case, the Executive is basing its actions on the very considerations rejected by Congress.

United States courts has recently been reconfirmed. *See Marschalk v. Iran, supra.* In rejecting the Executive's request for an indefinite stay in a suit against Iran, the court relied on

> the very specific and present right of an American plaintiff to access to the American courts to vindicate its claims to property located on American soil—a right stemming directly from Article III of the Constitution and the Fifth Amendment.

499 F. Supp. at 406. The court added:

> An immobilization of the judicial system through the grant of an indefinite stay . . . would simply add the American system of law and justice to the hostage rolls.

Id. at 406 n.11. Here, the issue is not only the "immobilization" of a proceeding, but also the complete extinguishment of valuable court orders obtained by plaintiffs and the evisceration of the right of access to the courts for an unknown number of claimants.[13]

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[13] Relying on the decision in *Orvis v. Brownell*, 345 U.S. 183 (1953), the government also argues that because the attachments were effected pursuant to a revocable license, they may be validly terminated by the Executive. For the reasons set forth in *Marschalk v. Iran, supra*, at 70-2, the *Orvis* precedent, however, is totally inapplicable here. The Executive's authority in that case depended on the express vesting provision in the old Trading With the Enemy Act of 1917 ("TWEA"), 50 U.S.C. App. §5(b) (1976 & Supp. I 1977), a provision which Congress purposefully deleted from the International Emergency Economic Powers Act of 1977 ("IEEPA"), 50 U.S.C. §1702 Supp. I 1977. In the absence of vesting authority, the result in *Zittman v. McGrath*, 341 U.S. 446 (1951), should control. In *Zittman*, the Supreme Court held that an executive freezing order did not prevent an *unlicensed* attachment from creating rights effective between the attaching creditor and the enemy debtor. Moreover, federal courts have repeatedly acknowledged that Section 5(b) of TWEA (whether the vesting or seizing power) is constitutional only because Congress provided in section 9(a) a method by which United States citizens could recover in a post-seizure hearing their interests in or debts from seized enemy property, or compensation for such taking *Becker Steel Co. of America v. Cummings*, 296 U.S. 74, 79 (1935) (dictum) (Stone, J.); *Central Union Trust Co. v. Garvan*, 254 U.S. 554, 568 (1921) (dictum) (Holmes, J.); *Uebersee-Finanz-Korporation v. Markham*, 158 F.2d 313, 314 (D.C. Cir. 1946), 332 U.S. 480 (1947) (although custodian initially seized entire property, he can retain "only that portion tainted with an enemy interest"); *Standard Oil Co. (New Jersey) v. Markham*, 57 F.Supp. 332, 334 (S.D.N.Y. 1944).

B. Implementation of the Executive Orders as Written Would Violate Equal Protection Rights.

The President's exercise of federal power is limited by the Fifth Amendment's due process clause, which subsumes the principles of equal protection. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976), *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). Equal protection principles are violated when the government treats differently those persons who are similarly situated.

The application of the previously described executive orders would result in a denial of equal protection among the various claimants against Iran. The President's agreements with Iran (a) assured that not only American banks with syndicated loans but *also foreign* members of syndicates, including as few as one U.S. bank, would be fully compensated (100 cents on the dollar on mature *and future* obligations alike) (Undertakings, ¶2) and (b) established a special escrow fund for unresolved bank claims. By contrast, compensation for the other American claimants, is dependent upon the vagaries of arbitration. These claimants have access not to the special escrow fund, but only to an admittedly inadequate $1 billion fund that Iran is supposed to maintain at a $500 million minimum level. Thus, the Claims Settlement Declaration spares banks with syndicated loans the necessity of any further litigation in any forum, at the same time that it invalidates plaintiffs' attachments, effectively prohibits their access to the courts, and requires them to resort to a foreign non-consensual arbitration panel for prosecution of their claims. The exclusion of many or most plaintiffs from arbitration raises the strong possibility that they will receive little or no compensation. *See* Subsection A, *supra*. Unquestionably, this constitutes unequal treatment between these two classes of claimants.[14]

Equal protection principles demand, at a minimum, reasonableness of classification. Where classifications distribute benefits

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[14] Apart from taking private property for public use without just compensation and denying equal protection, the disparate treatment accorded different claimants may also constitute a bill of attainder in violation of Article I, Section 9, of the Constitution. *Nixon v. Administrator of General Services*, 433 U.S. 425, 474 (1977).

and burdens in a manner inconsistent with fundamental rights, equal protection also demands that the classifications be strictly scrutinized and held unconstitutional, absent a compelling governmental justification. The Reagan Executive Order burdens contract claimants in such a manner as to interfere with their fundamental right of access to courts. The Supreme Court considered the fundamental right of equal access to the courts in *Boddie v. Connecticut*, 401 U.S. 371 (1971), and held it unconstitutional to impose a requirement that denies a claimant access to a judicial proceeding where that proceeding is "the only effective means of resolving the dispute at hand." *Id.* at 376.[15] The plaintiffs herein, like the plaintiff in *Boddie*, have no other effective means of resolving their claims. The alternatives are settlement, a highly tenuous possibility (especially in light of the fact that the United States does not have diplomatic relations with Iran), and arbitration by an untested international tribunal under rules which do not provide the fundamental safeguards of U.S. federal courts and which can make awards from a limited fund only to those claimants not excluded. Clearly, access to a United States court that has attached Iranian assets is the "only effective means" for many or most of the contract claimants to resolve their claims satisfactorily.

The denial of plaintiffs' right of access to the courts is subject to the strict scrutiny test, under which a classification is unconstitutional unless the government can show a compelling justification. None, however, has been asserted,[16] and the means chosen were hardly necessary to achieve any foreign policy interest of the United States. While the release of the hostages might be raised as the compelling state interest for the payment of some of the funds to Iran, that compelling interest cannot and

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[15] The Court since has stated that in furtherance of administrative purposes a court may impose limitations in the form of filing fees where a bankruptcy plaintiff "may adjust his debts by negotiated agreement with his creditors." *United States v. Kras*, 409 U.S. 434, 445 (1973).

[16] Without such an assertion of reasons for the suspect classification, a court cannot be satisfied that there exists an "overriding national interest" justifying the discrimination. *De Malherbe v. Int'l. Union of Elevator Constructors*, 476 F. Supp. 649, 667 (N.D. Cal. 1979) (holding employment discrimination violative of Fifth Amendment absent overriding national interest).

need not be stretched to sanction the discriminatory allocation of the balance of those funds by the Executive. Payment of funds to a foreign country does not compel such unequal treatment of U.S. creditors.

In addition, the only government interest that may explain this discrimination not only was not "compelling," but undoubtedly was mere convenience: bank claimants were willing to release assets held by them and were less likely to challenge the legality of the President's actions if their claims were satisfied. The acquiescence of the banks facilitated the transfer of frozen assets, notwithstanding court orders and attachments to the contrary. In effect, the President simply purchased the acquiescence of certain of those in possession of Iranian assets and in the best position otherwise to obstruct release of the hostages. Such a discriminatory application of governmental power is precisely the evil prohibited by the equal protection requirement, as well as the due process clause generally.

Finally, even if the Government's actions in seeking the denial of access to American courts and the nullification of attachments while banks are paid in full were not held to the standard of strict scrutiny, these actions would still be required to meet the basic standard of minimum rationality or reasonableness. If it were not possible to satisfy wholly all claimants with the frozen assets and still effectuate the agreements with Iran, the rational nondiscriminatory choice would have been either a *pro rata* allocation of frozen assets among the various claimants or a governmental guarantee that all would be paid the full value of their claims.

Enforcement of the executive orders now without assurance of equal protection must not be condoned, nor need it be, simply to fulfill U.S. obligations to a foreign government. The existing *international* arrangements can be supplemented by further *internal* provisions, as needed to protect and satisfy the constitutional rights of non-bank claimants.[17]

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[17] For example, the United States Government could provide assurance that all arbitration awards and/or settlements will be fully satisfied and that all awards will equal "just compensation". In addition, the government could substitute its guarantee for any attachment vacated.

POINT II

If The Judicial Branch Gives Effect To The International Agreements, It Must Fulfill Constitutional Requirements By Holding That Plaintiffs Will Have Judicial Redress For Failure Of Arbitral Awards To Provide Just Compensation

The Declarations may well be the "supreme Law of the Land" under Article VI of the Constitution, a proposition neither disputed nor admitted here. If so, this Court is bound to carry out their terms in order to avoid violation by the United States of obligations to Iran, under the international law doctrine *pacta sunt servanda*. At the same time, the Court must observe constitutional requirements even where the Executive Branch may have overlooked them.

It should be the Judiciary, not the Executive, that disposes of plaintiffs' suits and attachments. Article III of the United States Constitution and the congressional grant of jurisdiction in the FSIA provide for judicial power to render attachment orders and adjudicate the related claims. The purported effect of the Executive Orders, however, is to negate the attachment orders and oust the courts of existing jurisdiction. Neither the Executive nor Congress has the authority to nullify prior exercises of judicial power. *Electronic Data Systems Corp. Iran v. Social Security Organization of the Government of Iran*, 508 F. Supp. 1350, 1363 (N.D. Tex.), *cert. denied*, 49 U.S.L.W. 3907 (June 8, 1981) ("*Electronic Data*").

Article III, Section 1, of the United States Constitution states:

> The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Executive action devoid of statutory authority cannot interfere with the exercise of jurisdiction of United States courts, which can be conferred and redefined only by Congress. *Marschalk v. Iran, supra* at 17-57; *Electronic Data Systems Corp. Iran v. Social Security Organization of the Government of Iran, supra,*

508 F. Supp. at 1363; *Palmore v. United States*, 411 U.S. 389, 401 (1973); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845); *see Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).

But even if the executive orders are authorized by statute, such an exercise of congressionally delegated authority could not override the court orders at issue. *See Marschalk v. Iran*, *supra* at 17-35; *Electronic Data*, *supra*, 508 F. Supp. at 1364. It has been consistently held that, at least as to pending cases, even Congress may not withdraw jurisdiction from federal courts. *Marschalk v. Iran*, *supra* at 17-35; *Electronic Data*, *supra* at 27-28; *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (unconstitutional infringement upon the judicial power by congressional attempt to interfere with litigants' rights in pending cases), *cited with approval in Glidden*, 370 U.S. at 568.[18] *See Dames & Moore v. Atomic Energy Organization of Iran*, No. CV79-0418 (C.D.Cal. Feb. 18, 1981).

Moreover, Congress may not circumvent the strictures of the Constitution in attempting to withdraw jurisdiction. *Marschalk v. Iran*, *supra* at 57-63; *Electronic Data*, *supra*, 508 F. Supp. at 1363-64. As stated in *Battaglia v. General Motors Corp.* 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948):

> We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process

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[18] *Cf. Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869) (holding congressional action withdrawing jurisdiction constitutional). However, in *McCardle* Congress did not withdraw *all* jurisdiction from lower federal courts but only one avenue of appeal to the Supreme Court. Later decisions have cast doubt on the continued validity of *McCardle*. "There is a serious question whether the *McCardle* case could command a majority view today." *Glidden*, *supra*, 370 U.S. at 605 n.11 (Douglas, J., dissenting).

> of law or to take private property without just compensation.

169 F.2d at 257 (footnote omitted).[19] If Congress, with its constitutional authority over jurisdiction of federal courts,[20] cannot withdraw jurisdiction over pending cases, *a fortiori*, the Executive may not do so.

Basic to the exercise of jurisdiction is the continuing effectiveness of a court order and its immunity from non-judicial interference. In *In re Tyler*, 149 U.S. 164, 182-83 (1893), the Supreme Court held that property in the possession of a receiver who had been appointed by a circuit court was not amenable to seizure and levy under process issued from a state court to enforce a tax collection without consent of the federal circuit court. *See also Converse v. Highway Construction Co. of Ohio*, 107 F.2d 127, 130 (6th Cir. 1939) ("rule [of non-interference with property in the possession of the court without first obtaining the court's consent is] of such importance to the interest and safety of the public and the administration of justice that it should be inflexibly maintained on all occasions"); *In re Rubin*, 242 F.Supp. 408, 412 (E.D. Pa. 1965). The attachment orders in the instant cases have been levied upon, and the Executive may not interfere with the attached assets without the Court's consent. *Marschalk v. Iran, supra* at 64-82.

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[19] *See also Oestereich v. Selective Serv. Bd.*, 393 U.S. 233, 243 n.6 (1968) (Harlan J., concurring); *Crowell v. Benson*, 285 U.S. 22, 56-57 (1932); *Eastern States Petroleum Corp. v. Rogers*, 280 F.2d 611 (D.C. Cir.) *cert. denied*, 364 U.S. 891 (1960); *Government Employees Ins. Company v. LeBleu*, 272 F. Supp. 421, 425 (E.D. La. 1967); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 513, 516 (1974); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1373 (1953).

[20] As previously demonstrated *supra*, plaintiffs have a property interest cognizable under the Fifth Amendment in the attachment orders and the right to access to the courts. Article III mandates that the judiciary shall adjudicate all claims arising under the Constitution: "The judicial Power shall extend to all Cases . . . arising under this Constitution. . . ." U.S. Const. art. III, § 2, cl. 1. Accordingly, even Congress may not intrude upon the "carefully designed contours of Federal Court jurisdiction" where a constitutional claim is involved. *Marschalk v. Iran, supra* at 17-35; *Electronic Data, supra*, 508 F. Supp. at 1364.

Assuming, however, that the terms set forth in the Declarations constitute a valid international agreement, all agencies of the United States, including the Judiciary, should carry out those terms, but only in such a way as to comply with the Constitution. For the reasons given above, the Executive should not attempt to supersede the Judiciary. The latter can be expected to observe, on its own initiative, the international obligations of the United States.

Similarly, the Judiciary must be expected to observe constitutional requirements. Even if for some reason the Declarations had stated that plaintiffs were *not* to be assured just compensation and equal protection in the taking of their claims and attachments for the public purpose of hostage release, the Courts are required nevertheless to assure just compensation and equal protection, since Constitutional rights cannot be taken away by international agreement. *Reid v. Covert, supra.*

However, the *Reid v. Covert* problem of conflict between the Constitution and an international agreement never arises here as there is no conflict between the Declarations and plaintiffs' rights. The Declarations do not say that plaintiffs must *not* receive just compensation and equal protection but that plaintiffs are to be deprived of their claims and attachments as part of the hostage-release package. The Declarations add that some plaintiffs can have access to the untested and questionable remedy of the Tribunal but most certainly do not forbid the United States to fulfill its constitutional duty to see that plaintiffs are fully paid, just as the U.S. and foreign syndicated banks were fully paid. Such full payment must be assured by the Judiciary, since the Executive has simply assumed it without any guarantee.

There is no basis for concluding that Presidents Carter and Reagan intended plaintiffs to get less than their constitutional due, and every reason to conclude the contrary. While the Executive Branch must have believed it was treating plaintiffs fairly in that the Tribunal and Iran would make whole those over whom the Tribunal exercised jurisdiction, unfortunately, it failed to assure that this would occur. Such assurance is all that Sylvania is asking and it is for the Judiciary to provide it.

This Court must assure plaintiffs of judicial redress for any short-fall of future awards. The assurance must occur now, accompanying the present taking of claims and attachments, to preserve the constitutionality of such taking. Contrary to the view of the District of Columbia Circuit that "there is a better time: when and if the United States moves to dismiss the claims in District Court," *American Int'l Group, Inc. v. Islamic Republic of Iran, supra* at 41, any such time would be too late. Once a claim has been accepted by the Tribunal, it will never return to District Court unless any award goes unpaid. The United States need make no such motion to dismiss; a suspension will automatically become a dismissal as soon as the Tribunal holds against claimant or its award, however inadequate, is paid.

The obvious fact that any short-fall in an award as paid is, at present, speculative militates in favor of a present holding that relief under the Tucker Act, 28 U.S.C. §§ 1491 *et seq.*, is available to claimants, including Petitioner and Sylvania. In *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-5 (1974), the Supreme Court repeatedly made clear that there might never be any short-fall below the constitutional level of compensation, but that the parties whose property inevitably would be conveyed to Conrail were held to be entitled to *present* assurance of adequate payment.

> Yet there must be at the time of taking "reasonable certain and adequate provision for obtaining compensation." *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890); see also *Joslin Mfg. Co. v. City of Providence*, 266 U.S. 668, 677 (1923); *United States v. Dow*, 357 U.S. 17, 21 (1958). Therefore we must determine if the Tucker Act is available.

419 U.S. 102, 124-5. The Court found that, as in the present cases, "occurrence of the conveyance allegedly violative of Fifth Amendment rights is in no way hypothetical or speculative". Further, said the Court, "it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Id.* at 143.

Even though the *Regional Rail* parties had stipulated the impossibility of a present determination of even which properties would be transferred, not to mention their value or the value of the consideration to be received, *id.* at 146, the Court held "ripe for adjudication . . . the availability of the Tucker Act remedy *if* the consideration exchanged upon final conveyance of the rail properties is less than the constitutional minimum." *Id.* at 147 (emphasis added).

In short, the Court in *Regional Rail* was holding that any speculation about short-fall in compensation for property inevitably to be conveyed must be eliminated by a present holding of Tucker Act availability.

> We hold . . . that while the conveyance provisions of the Rail Act might raise serious constitutional questions if a Tucker Act suit were precluded, the availability of the Tucker Act guarantees an adequate remedy at law for any taking which *might* occur as a result of the final-conveyance provisions.

Id. at 149 (emphasis added). The hypothetical nature of any "conveyance taking" was underscored when the Court summarized its holding:

> However, we have already held that, because of the *possibility* that the Rail Act will work a taking, there must be assurance of consideration equal to any constitutional shortfall, and that a Tucker Act remedy is available to provide that assurance.

Id. at 155 (emphasis added).

The holding of Tucker Act availability for "conveyance takings" was arrived at by the same reasoning as that which supported its availability for "erosion takings". Congress in the Rail Act had not amended the Tucker Act. Similarly, in the present situation, no party has argued that the President ever purported to interfere with Tucker Act availability for claimants short-changed by the arbitration process.

Not only is there "no better time" to decide that the Tucker Act applies; this is the last chance. If, for any reason, the Tucker Act does not apply, then suspension of claims against Iran would be invalid. Judge Duffy's holding in *Marschalk v. Iran, supra*, regarding 28 U.S.C. §1502 illustrates the point. Judge Duffy concluded that §1502 would bar Tucker Act relief to Iran claimants, with the consequence that the hostage settlement would be invalid even if the President otherwise was acting within his powers. *Marschalk v. Iran, supra* at 82-85. This is an issue that must be confronted now, not at a later time after claimants, having lost their law suits and attachments, and gone to arbitration, are denied full compensation, either by failure of Iran to pay an award or by an outrageously low award. For claimants to be told only then that §1502 barred Tucker Act relief is unthinkable.

The issue under §1502 is simply whether a claim against the United States for unjustly compensated taking of private property in the process of the Iran settlement grows out of or is dependent upon (a) the settlement or (b) the Fifth Amendment. The First Circuit properly held the latter. *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, supra.* In prior cases courts have uniformly held that in order for this section to bar jurisdiction, the claim "must have its origin—derive its life and existence—from some treaty stipulation". *United States v. Weld*, 127 U.S. 51, 57 (1888); *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 904 (Ct.Cl. 1976);[21] see *S.N.T. Fratelli Gondrand v. United States*, 166 Ct.Cl. 473, 478 (1964). Sylvania's claim to just compensation and equal protection derives from the United States Constitution and not from the General Declaration or the Claims Settlement Declaration. The Supreme Court should hold that §1502 does not bar Tucker Act relief to Sylvania and other claimants against Iran.

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[21] In *Hughes Aircraft*, the Court of Claims declared that § 1502 applied only where, "absent certain express terms or provisions [of a treaty or executive agreement], there could be no claim at all." 534 F.2d at 904.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should not permit enforcement of the international agreements, executive orders and regulations at issue, in the absence of adequate assurances to claimants, including Petitioner and Sylvania Technical Systems, Inc., that their constitutional rights to just compensation and equal protection will be fully protected.

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No. 80-2078

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ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership,

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—v.—

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents,

—and—

BANK MARKAZI IRAN, et al.,

Intervenors.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

MOTION OF 26 IRANIAN BANKS, FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

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---

26 Iranian commercial banks* which on June 15, 1981 moved for leave to intervene in this proceeding hereby respect-

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* Bank Melli Iran, Industrial Credit Bank, Industrial and Mining Development Bank of Iran, International Bank of Iran, Agricultural Development Bank of Iran, Bank of Tehran, Agricultural Cooperative Bank of Iran, Bank Bazargani Iran, Bank Bimeh Iran, Bank Iran-

fully move for leave to file the accompanying brief amici curiae. In the event the Court ultimately grants our motion to intervene, we respectfully request that this motion be deemed moot and that the accompanying brief be considered as one filed on behalf of the Iranian banks as intervenors.

INTEREST OF THE AMICI

The 26 Iranian commercial banks were named as parties defendant in the underlying action originally brought in late 1979 in Los Angeles by petitioner Dames & Moore against them, the Atomic Energy Organization of Iran, the Government of Iran, Bank Markazi Iran (Iran's Central Bank), and one separately represented Iranian commercial bank, Bank Saderat Iran. *Dames & Moore v. Atomic Energy Organization of Iran,* No. CV 79-04918 LEW (C.D. Cal.). The action now before this Court, *Dames & Moore v. Regan,* was commenced in the same court on April 28, 1981 to challenge the validity of the Declarations signed in Algeria on January 19, 1981 (the "Algerian Declarations") and the various executive orders and regulations issued thereafter to implement those diplomatic accords. On May 28, 1981, Judge Waters entered a single ruling applicable to both of the Dames & Moore suits, as well as to parallel suits brought by another claimant.* His ruling

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shahr, Bank Dariush, Bank Kar, The Bank of Iran and the Middle East, Bank of Omran, Bank Pars, Bank Rafah Kargaran, Bank Sakhteman, Bank Sanaye Iran, Bank Sepah, Bank Shahryar, Banque Etebarate Iran, Development and Investment Bank of Iran, Distributors Cooperative Credit Bank, The Foreign Trade Bank of Iran, Iranians' Bank, and Mortgage Bank of Iran.

In compliance with Rule 28.1 of the Rules of this Court we note that Bank Mellat, Bank Tejarat, Irano British Bank, Mercantile Bank of Iran and Holland, International Bank of Iran and Japan and Iran Arab Bank may be considered affiliates of certain of the 26 banks listed above.

* *Daniel, Mann, Johnson & Mendenhall v. Regan,* No. CV 81-1100 LEW (C.D. Cal.), and *Daniel, Mann, Johnson & Mendenhall v. Iran,* No. CV 80-277 LEW (C.D. Cal.).

dismissed the suits against Secretary Regan and the United States, vacated the attachments in the underlying litigations and stayed further proceedings.

Prior to January 19, 1981, the Iranian commercial banks had moved to dismiss the underlying action on the grounds that the banks were strangers to the commercial dispute, that neither the Foreign Sovereign Immunities Act of 1976, nor any other body or principle of law permitted jurisdiction over foreign entities or attachment of their assets solely on the ground that they were "agents or instrumentalities" of the same foreign government which allegedly controlled the party of whose conduct plaintiff complained, that there was no other basis for bringing the Iranian commercial banks into the litigation, and that the Los Angeles court lacked personal jurisdiction over the bank defendants. Although these issues were briefed and argued at length, Judge Waters denied the banks' motion on January 20, 1981 without written or oral opinion.

On January 19, 1981, the United States and Iran entered into the Algerian Declarations resolving the hostage dispute. The Declarations also provided for vacation of the attachments against Iranian assets, for termination of the various Iranian litigations and for resolution—with certain exceptions—of claims against Iran through international arbitration proceedings. Awards in those proceedings are to be secured by a billion dollar fund which is to be created out of the attached Iranian assets and which is to be maintained at a level of $500 million by Iran until all awards of the Tribunal are satisfied.

The interest of the amici in this proceeding is plain. They constitute the vast majority of the defendants named in the underlying action. Their assets are subject to many of the attachments whose continuance is at issue here. Several of the Iranian commercial banks including Bank Melli Iran are, in addition, garnishees served with writs of attachment with respect to assets of other Iranian entities.

Moreover, the Iranian commercial bank defendants argued to Judge Waters in numerous briefs the validity of the Declarations and of the implementing Executive Orders and Regulations, both in the underlying action and in the related suit Dames & Moore brought against Secretary Regan and the United States. And they have briefed and argued the precise issues now before this Court in the Courts of Appeals for the District of Columbia and Second Circuits, as well as before a number of District Courts.

CONCLUSION

We respectfully request that in the event our motion for leave to intervene is not granted that the 26 Iranian commercial banks be permitted to file their brief as amici curiae.

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QUESTIONS PRESENTED

1. Was the President empowered, under Article II of the Constitution and in light of the long-established practice of presidential settlement of claims of American nationals against foreign governments, to suspend claims against Iran and its instrumentalities as part of an overall settlement of an international crisis?

2. Was the President empowered, under the Constitution, the International Emergency Economic Powers Act of 1977 ("IEEPA"), and the Hostage Act of 1868, to nullify prejudgment attachments issued against Iranian assets, where such attachments had been obtained pursuant to a revocable license and only after the President had exercised his IEEPA powers on November 14, 1979 to freeze Iranian assets?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE AND INTEREST	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE PRESIDENT'S POWER UNDER ARTICLE II TO SETTLE CLAIMS OF AMERICAN NATIONALS AGAINST FOREIGN GOVERNMENTS IS CONFIRMED BY LONG ESTABLISHED PRACTICE	7
A. The President Has Settled Such Claim For Nearly 200 Years	8
1. The Jay Treaty And Some 19th Century Agreements	9
2. Post-War Agreements With East European Nations And The Recent Agreements With China	10
B. The President's Authority To Settle Claims Is Exercised To Advance National Foreign Policy Objectives; It Exists Independent Of The Request Or Consent Of Individual Claimants	12
C. Enactment Of The FSIA Did Not Revoke The President's Power To Settle Private Claims	16
D. The Long Established Power To Settle Claims Does Not Infringe The Article III Jurisdiction Of The Federal Courts	19

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PAGE

II. THE PRESIDENT'S NULLIFICATION OF ALL ATTACHMENTS AGAINST IRANIAN ASSETS WAS A PROPER EXERICSE OF EXPRESS STATUTORY AUTHORITY 20

A. The Language, Purpose And Structure Of IEEPA Empower The Executive To Nullify The Attachments 21

1. The Statutory Mandate Is Unambiguous 21

2. Petitioner's Attachments Were Obtained In The Context of The President's Exercise Of His IEEPA Powers 23

3. The President's Orders Have Been Acquiesced In By Congress, Sustained By The Appellate Courts, But Mistakenly Ruled Unconstitutional By Judge Duffy. 25

B. The Hostage Act Is An Additional—And Alternative—Basis For The President's Actions. 27

III. CONCLUSION 29

ADDENDUM

TABLE OF AUTHORITIES

CASES — PAGE

American International Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir. June 5, 1981).... 6, 9, 18, 19, 25-26

Chas. T. Main International, Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir. May 22, 1981) 6, 13, 18, 19, 25-26

Ex Parte Peru, 318 U.S. 578 (1943)..... 18

Gray v. United States, 13 Ct. Cl. 340 (1886)..... 15

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)... 30

Marschalk Co. v. Iran National Airlines Corp., No. 79 Civ. 7035 (S.D.N.Y., June 11, 1981).....16, 26-27

Meade v. United States, 76 U.S. (9 Wall) 691 (1869)... 9

Orvis v. Brownell, 345 U.S. 183 (1953).....5, 23-25, 26

Orvis v. McGrath, 198 F.2d 708 (2d Cir. 1952)..... 24

Ozanic v. United States, 188 F.2d 228 (2d Cir. 1951)... 8

Propper v. Clark, 337 U.S. 472 (1949)..... 21

Security Pacific, National Bank v. The Government and State of Iran, No. 79-4661 (C.D. Cal. Apr. 30, 1981). 22

Thos. P. Gonzales Corp. v. Consejo Nacional Produccion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980).... 17

United States v. Belmont, 301 U.S. 324 (1937)..... 7, 13

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)..... 7

United States v. Pink, 315 U.S. 203 (1942).....7, 8, 13

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)..... 4, 13-15, 19-20

PAGE

United States v. Yoshida International, Inc., 526 F.2d 560 (C.C.P.A. 1975) 21

Verlinden B.V. v. Central Bank of Nigeria, No. 80-7413, slip op. (2d Cir. Apr. 16, 1981) 17-18

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 12, 20

STATUTES AND REGULATORY MATERIALS:

22 U.S.C. § 1732 ..... 5, 27-29

28 U.S.C. § 1330..... 3

28 U.S.C. § 1332(a)(2)..... 18

28 U.S.C. § 1359..... 18

28 U.S.C. § 1391(f) 3

28 U.S.C. § 1441(d) 3

28 U.S.C. §§ 1602-11 3

28 U.S.C. § 1605(a)(2)..... 17

28 U.S.C. § 1611(b)(1)..... 17

50 U.S.C. § 1701, *et seq*..... 5, 23

50 U.S.C. § 1702(a)(1)(B) 21

50 U.S.C. § 1703(b) 25

50 U.S.C. § 1703(c) 25

50 U.S.C. § 1706(b) 7

50 U.S.C. App. § 5(b) 21

Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979), *reprinted in* 50 U.S.C. § 1701 (1981)..... 6, 23

31 C.F.R. § 535.203 23

31 C.F.R. § 535.418 23

PAGE

31 C.F.R. § 535.502 23

31 C.F.R. § 535.504 23

TREATIES, EXECUTIVE ORDERS AND CLAIMS SETTLEMENT AGREEMENTS:

Agreement Between the Government of the United States of America and the Government of the People's Republic of Bulgaria Regarding Claims of United States Nationals and Related Financial Matters, art. I. para. 1(c), 14 U.S.T. 969, T.I.A.S. No. 5287 (Jul. 2, 1963) 11

Agreement Between the Government of the United States of American and the Government of the People's Republic of China Concerning the Settlement of Claims, art. I, para. a, T.I.A.S. No. 9306 (May 11, 1979) 11

Convention of Peace Commerce and Navigation, Sept. 30, 1800, as amended, February 18, 1801 (effective Dec. 19, 1801) 1 Malloy Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers (1910) 14

Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, art. 2, para. 2(2), 24 U.S.T. 522, T.I.A.S. No. 7569 (Mar. 6, 1973) 11

Agreement Between the Government of the United States of America and the Government of the Polish People's Republic Regarding Claims of Nationals of the United States, art. II(c), 11 U.S.T. 1953, T.I.A.S. 4545 (Jul. 16, 1969) 10

PAGE

Agreement Between the Government of the United States of America and the Government of the Rumanian People's Republic Relating to Financial Questions Between the Two Countries, art. I, para. 1, 11 U.S.T. 317, T.I.A.S. No. 4451 (Mar. 30, 1960) 10-11

"Treaty of Amity Commerce and Navigation "(Jay Treaty) (Nov. 19, 1794), 1 Malloy, *Treaties, Conventions, International Acts, Protocols, and Agreements Between The United States and Other Powers (1910)*. 9

"Arbitration of Sala Claim" (Apr. 28, 1902), 7 Bevans, *Treaties and Other International Agreements of the United States of America* 1776-1949 (1974) 10

LEGISLATIVE HISTORY:

Cong. Globe, 40th Cong., 2d Sess. (1868) 27-28

Hearings Before Senate Subcomm. on Separation of Powers of the Comm. on the Judiciary, Congressional Oversight of Executive Agreements, 94th Cong., 1st Ses. (1975) 16

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604 18

S. Rep. No. 466, 85th Cong., 1st Sess. (1977), *reprinted in* [1977] U.S. Code Cong. & Ad. News 4540 22

OTHER AUTHORITIES:

L. Henkin, *Foreign Affairs and the Constitution* (1972) 13

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Petitioner,

—v.—

DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents,

—and—

BANK MARKAZI IRAN, et al.,

Intervenors.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

BRIEF OF 26 IRANIAN COMMERCIAL BANKS AS *AMICI CURIAE* (MOTION TO INTERVENE PENDING)

STATEMENT OF THE CASE AND INTEREST

This brief is filed in support of the decision below on behalf of 26 Iranian commercial banks[1] which on June 12, 1981

1 Bank Melli Iran, Industrial Credit Bank, Industrial and Mining Development Bank of Iran, International Bank of Iran, Agricultural Development

sought leave to intervene in this proceeding. That motion is still pending before the Court and this brief is submitted by the 26 banks as proposed intervenors and as *amici curiae*. In the event the Court denies the motion to intervene, we respectfully request that this brief be treated as one submitted on behalf of the 26 banks as *amici curiae*.

The 26 Iranian commercial banks were named as parties defendant in the underlying action originally brought in late 1979 in Los Angeles by petitioner Dames & Moore against them, the Atomic Energy Organization of Iran, the Government of Iran, Bank Markazi Iran (Iran's Central Bank), and one separately represented Iranian commercial bank, Bank Saderat Iran. *Dames & Moore v. Atomic Energy Organization of Iran*, No. CV 79-04918 LEW (C.D. Cal.). The action now before this Court, *Dames & Moore v. Regan*, was commenced in the same court and before the same judge on April 28, 1981 to challenge the validity of the Declarations signed in Algeria on January 19, 1981 (the "Algerian Declarations") and the various executive orders and regulations issued thereafter to implement in part those diplomatic accords. On May 28, 1981, Judge Laughlin Waters entered a single ruling applicable to both of the Dames & Moore suits, as well as to parallel suits brought by another claimant.[2] His ruling dismissed the suits against Secretary Regan and the United States, vacated the attachments in the underlying litigations, and stayed further proceedings.

Bank of Iran, Bank of Tehran, Agricultural Cooperative Bank of Iran, Bank Bazargani Iran, Bank Bimeh Iran, Bank Iranshahr, Bank Dariush, Bank Kar, The Bank of Iran and the Middle East, Bank of Omran, Bank Pars, Bank Rafah Kargaran, Bank Sakhteman, Bank Sanaye Iran, Bank Sepah, Bank Shahryar, Banque Etebarate Iran, Development and Investment Bank of Iran, Distributors Cooperative Credit Bank, The Foreign Trade Bank of Iran, Iranians' Bank, and Mortgage Bank of Iran.

In compliance with Rule 28.1 of the Rules of the Supreme Court, we note that Bank Mellat, Bank Tejarat, Irano British Bank, Mercantile Bank of Iran and Holland, International Bank of Iran and Japan, and Iran Arab Bank may be considered affiliates of certain of the 26 banks listed above.

2 *Daniel, Mann, Johnson & Mendenhall v. Regan*, No. CV 81-1100 LEW (C.D. Cal.), and *Daniel, Mann, Johnson & Mendenhall v. Iran*, No. CV 80-277 LEW (C.D. Cal.).

Prior to January 19, 1981, the Iranian commercial banks had moved to dismiss the underlying action on the grounds that the banks were strangers to the commercial dispute, that neither the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-11 (the "FSIA"), nor any other body or principle of law permitted jurisdiction over foreign entities or attachment of their assets solely on the grounds that they were "agents or instrumentalities" of the same foreign government which allegedly controlled the party of whose conduct plaintiff complained, that there was no other basis for bringing the Iranian commercial banks into the litigation, and that the Los Angeles court lacked personal jurisdiction over the bank defendants. Although these issues were briefed and argued at length, Judge Waters on January 20, 1981, denied the banks' motion without written or oral opinion.

On January 19, 1981, the United States and Iran entered into the Algerian Declarations resolving the hostage crisis. The Declarations also provided for vacation of the attachments against Iranian assets, for termination of the various Iranian litigations and for resolution—with certain exceptions—of claims against Iran through international arbitration proceedings. Awards in those proceedings are to be secured by a billion dollar fund which is to be created out of the attached Iranian assets and which is to be maintained at a level of $500 million by Iran until all awards of the arbitral tribunal are satisfied.

The interest of the Iranian commerical banks in this proceeding is plain. They constitute the vast majority of the defendants named in the underlying action. Their assets are subject to many of the attachments whose continuance is at issue here. Several of the Iranian commercial banks, including Bank Melli Iran, are, in addition, garnishees served with writs of attachment with respect to assets of other Iranian entities.

The Iranian commercial bank defendants argued the validity of the Declarations and of the implementing Executive Orders to Judge Waters, both in the underlying action and in the related suit Dames & Moore brought against Secretary Regan and the United States. And they have briefed and argued these

same issues in the Courts of Appeals for the District of Columbia and Second Circuits, as well as before a number of District Courts.

SUMMARY OF ARGUMENT

I. Presidential authority to settle claims of American nationals against foreign governments is inherent in the executive power under Article II of the Constitution, and is confirmed by long-established practice. We draw together in this brief and its addendum more than 165 instances of presidential claims settlements, ranging in time from the Jay Treaty of 1794 to the China Claims Settlement of 1979.

This historical record demonstrates that the power to settle claims does not depend upon the consent of private claimants whose interests might be affected by the settlement process. As shown in this Court's decision in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), the foreign policy needs of the Nation have sometimes required sacrifice of individual claims.

This long and consistent historical pattern was not scrapped when Congress in 1976 enacted the FSIA. The FSIA worked certain procedural changes, principally placing determination of sovereign immunity in the courts. But, there is no evidence that Congress or the Executive thereby intended to strip the President of his claims settlement power. Nor is there reason to believe that continuation of that power, exercised in 1979 with respect to China claims, is inherently inconsistent with life under the FSIA.

Neither settlement of the claims against Iran, nor vacation of the prejudgment attachments has deprived federal courts of their Article III jurisdiction. The jurisdiction of the courts has not been challenged. Rather, through the Algerian Declarations, the law to be applied by the courts in these cases has changed. The courts must apply that changed law, vacate the attachments, and suspend the claims.

II. Presidential authority to nullify the prejudgment attachments here exists not only under Article II, but rests as well

upon express statutory mandates provided by Congress in the International Emergency Economic Powers Act of 1977, 50 U.S.C. § 1701 et seq. ("IEEPA") and the Hostage Act of 1868, 22 U.S.C. § 1732 (the "Hostage Act"). IEEPA explicitly states that the President may "direct and compel, nullify, void, prevent or prohibit" the "acquisition," "use," "transfer" or "exercising" of any "right, power or privilege with respect to . . . any property in which any foreign country . . . has any interest." The statutory language makes clear that the power of the President is not confined to the ability to freeze assets, but includes authority to unfreeze them.

The prejudgment attachments made possible by the President's freeze order, were obtained by petitioner and other claimants under a revocable license. Given this Court's decision in *Orvis v. Brownell*, 345 U.S. 183 (1953), such attachments created no rights that would survive revocation of the license.

The Hostage Act provides an additional, and an alternative, basis for the President's action vacating the attachments. That statute authorized the President to take any action he thought necessary to obtain the release of citizens made hostage abroad. He froze Iran's assets, licensed commencement of suit and prejudgment attachments, then—when other steps failed to free the hostages—negotiated a thaw of the freeze and return of Iran's assets.

Not only did the President act under express statutory authority, he did so with the apparent acquiescence of Congress. As required by IEEPA, the President regularly reported to Congress on the steps he was taking under IEEPA to resolve the crisis, including vacation of the prejudgment attachments and suspension of claims. At no time has Congress expressed disapproval.

ARGUMENT

The authority of the Executive Branch to vacate prejudgment attachments obtained pursuant to revocable licenses after the November 14, 1979 blocking order, to direct the transfer of Iranian assets to the Federal Reserve, and to suspend claims

against Iran and its governmental entities has been expressly recognized by the only two Courts of Appeals to reach the merits of these issues. *American International Group, Inc. v. Islamic Republic of Iran*, No. 80-1779 (D.C. Cir. June 5, 1981) ("*AIG*"); *Chas. T. Main International, Inc. v. Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981) ("*Main*"). Both appellate courts found that the language, purpose and structure of IEEPA empowered the Executive Branch to nullify prejudgment attachments which its earlier blocking order had made possible and which subsequent revocable licenses authorized. Moreover, both courts concluded that the foreign affairs powers of the Executive Branch under Article II of the Constitution—viewed against an established tradition of presidential settlements of private claims against foreign governments—justified suspension of claims in the circumstances present.[3] The Hostage Act served as additional authority for the President's actions, according to a majority of the panel in *AIG*.

We discuss below these three bases for the President's actions. We note, preliminarily, the political context in which those actions were taken. Faced with an international crisis of unquestioned magnitude, the President successfully used his statutory power over foreign assets held in this country, initially to freeze those assets, and subsequently to arrange for their transfer out of this country. He thereby accomplished a peaceful resolution of a tense situation which he had termed "an unusual and extraordinary threat to the national security, foreign policy and economy of the United States . . . ." Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979), *reprinted in* 50 U.S.C. § 1701 (1981). The President formally apprised Congress, as required by IEEPA, of the steps taken to stabilize and then to resolve the crisis. He reported to Congress on the initial

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[3] It is the position of the Iranian commercial banks that the Algerian Declarations require not merely the "suspension" of pending litigation proposed by the United States, but immediate termination of such litigation. Resolution of this difference in interpretation may not be undertaken by the courts of the United States. The Algerian Declarations provide that all disputes between the two governments concerning the meaning and implementation of the Algerian Declarations must be referred to the International Tribunal established by the United States and Iran.

implementation of the freeze, on its continuation six months and one year later, and advised the Congress of the terms of the Algerian Declarations and the implementing executive orders. Although explicitly authorized to do so by 50 U.S.C. § 1706(b), Congress has indicated no disapproval. The context, therefore, is that of an international crisis resolved by a procedure contemplated, and acquiesced in, by the Congress. The 1977 IEEPA legislation worked precisely as intended. This outcome, as well as the statutory language, judicial precedents and diplomatic history to which we now turn, fully justify the governmental action petitioner comes before this Court to challenge.[4]

I. THE PRESIDENT'S POWER UNDER ARTICLE II TO SETTLE CLAIMS OF AMERICAN NATIONALS AGAINST FOREIGN GOVERNMENTS IS CONFIRMED BY LONG ESTABLISHED PRACTICE.

This Court has expressly recognized the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). The President controls and conducts America's foreign affairs, serves as Commander in Chief, receives ambassadors and envoys, and recognizes foreign governments. It has long been established that, among all the President's Article II powers, his foreign affairs power is at once the broadest and the least amenable to judicial review.

The power of the President to settle claims of American nationals against foreign sovereigns is incident to the executive authority vested in the President by Article II. In *United States v. Pink*, 315 U.S. 203 (1942), and in *United States v. Belmont*, 301 U.S. 324 (1937), this Court specifically upheld the constitutionality of the Litvinov Assignment with the Soviet Union as a means for settling outstanding claims between citizens of the two countries in connection with recognition of the Soviet

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4 We do not brief the issue whether, should a "taking" occur, petitioner would be entitled to compensation from the United States. We understand that this point is addressed in other briefs being filed with the Court.

government. See also *Ozanic v. United States*, 188 F.2d 228 (2d Cir. 1951). In *Pink*, the Court explained:

> "[Executive] authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition . . . Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.' *United States v. Curtiss-Wright Corp.*, *supra*, p. 320. Effectiveness in handling the delicate problems of foreign relations requires no less." 315 U.S. at 229 (citations omitted).

Justice Frankfurter, concurring in *Pink*, stated: "That the President's control of foreign relations includes the settlement of claims is indisputable." 315 U.S. at 240. And, as Judge Learned Hand wrote in *Ozanic*, 188 F.2d at 231:

> "The Constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies. The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations." (footnote omitted).

A. The President Has Settled Such Claims For Nearly 200 Years.

The President's power to settle claims by American nationals against foreign nations is a necessary and logical concomitant to his foreign affairs powers. For nearly 200 years, presidents have, in fact, by both executive agreement and treaty compromised the claims of American nationals against foreign sovereigns and their citizens. We attach as an addendum to this brief a chart of approximately 165 such executive agreements

and treaties entered into by the United States to compromise and settle claims of American nationals against foreign sovereigns and citizens of foreign nations. As this "Barr chart" demonstrates,[5] the United States has made such agreements throughout its history. These agreements encompass all manner of claims by American nationals—commercial contract, tort and expropriation—and they have been made without regard to the immunity or lack thereof of the defendant sovereign or foreign national. As the *AIG* court, which had the Barr chart before it, recently held:

> "We find that there is a long-standing practice of settling private American claims against foreign governments through executive agreements." *AIG*, slip op. at 28.

1. The Jay Treaty And Some 19th Century Agreements.

As early as the Jay Treaty of 1794, the United States established a mixed commission, consisting of nationals of both countries, to resolve, among other things, claims of American citizens based on the illegal seizure of their ships and other property by the British government. 1 Malloy, *Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States and Other Powers* 590 (1910). In the 190 years since the Jay Treaty, numerous claims of American nationals based on expropriation or nationalization of their property have been settled by treaty or executive agreement. Approximately one hundred such claims agreements relating to nationalizations, seizures and expropriations are listed in the Barr chart.

Such agreements have also been used to settle contract claims against foreign governments. In 1819, for example, the United States concluded a treaty with Spain renouncing all claims for damages suffered by the United States or its citizens prior to the date of the treaty, including certain contract claims for goods allegedly sold and delivered to Spain by American nationals. See *Meade v. United States*, 76 U.S. (9 Wall) 691

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5 So-called here because researched and prepared by Michael H. Barr, at the suggestion of, and in cooperation with, Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C., counsel for Bank Markazi Iran.

(1869), addressing the Spanish treaty. And in 1902, the Executive, without congressional ratification, concluded an agreement for the arbitration and payment of certain accounts and goods sold and delivered claims by J. Sala & Co., a New York company, against the Dominican Republic. "Arbitration of Sala Claim," reported in 7 Bevans, *Treaties and Other International Agreements of the United States of America 1776-1949* at 184 (1974).

2. Post-War Agreements With East European Nations And The Recent Agreement With China.

Since World War II, the President has negotiated at least 13 executive agreements settling claims of American nationals against foreign nations. For example, in executive agreements made in the 1960's with Poland, Rumania and Bulgaria, in 1973 with Hungary, and in 1979 with China, the United States, in return for lump sum payments, settled a variety of expropriation and commercial contract claims allegedly due American nationals from those nations or companies nationalized by them. Thus, in 1960, the United States explicitly settled and discharged claims of American nationals against Poland and its citizens accruing on or before the date of the agreement and arising out of "the nationalization or other taking by Poland of property and of rights and interests in and with respect to property," as well as "debts owed by enterprises which have been nationalized or taken by Poland." Agreement Between the Government of the United States of America and the Government of the Polish People's Republic Regarding Claims of Nationals of the United States, art. II (a,c), 11 U.S.T. 1953, T.I.A.S. No. 4545 (July 16, 1960).

Similarly, the 1960 Rumanian claims settlement agreement discharged Rumania and its nationals from all "[c]laims for the nationalization, compulsory liquidation, or other taking, prior to the date of this Agreement of property, rights and interests of nationals of the United States of America in Rumania." Also discharged were "[c]laims predicated upon obligations expressed in currency of the United States of America arising out of contractual or other rights acquired by nationals of the United States of America prior to September

1, 1939, and which became payable prior to September 15, 1947." Agreement Between the United States of America and the Rumanian People's Republic Relating to Financial Questions Between the Two Countries, art. I, para. 1(b,c), 11 U.S.T. 317, T.I.A.S. No. 4451 (Mar. 30, 1960).

The Bulgarian agreement settled and discharged "[c]laims of nationals of the United States of America for the nationalization, compulsory liquidation or other taking of property and of rights and interests (direct and indirect) in and with respect to property prior to the effective date of this Agreement," as well as commerical contract claims. Agreement Between the Government of the United States of America and the Government of the People's Republic of Bulgaria Regarding Claims of United States Nationals and Related Financial Matters, art. I, para. 1(b,c), 14 U.S.T. 969, T.I.A.S. No. 5387 (July 2, 1963).

The Hungarian agreement similarly discharged both commercial contract claims of the United States or United States nationals against Hungary or Hungarian nationals, and claims based on "property, rights and interests affected by Hungarian measures of nationalization, compulsory liquidation, expropriation, or other taking on or before the date of this Agreement, excepting real property owned by the Government of the United States." Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, art. 2, para. 2(1), 24 U.S.T. 522, T.I.A.S. No. 7569 (Mar. 6, 1973).

This historical practice of settling claims of American nationals against foreign nations by executive agreement was not interrupted by passage of the FSIA in 1976. In 1979, the President concluded an executive agreement with the People's Republic of China that settled "the claims of the USA and its nationals . . . against the PRC arising from any nationalization, expropriation, intervention, and other taking of, or special measures directed against, property of nationals of the USA on or after October 1, 1949 and prior to the date of this Agreement." Agreement Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims, art. I, para. a, T.I.A.S. No. 9306 (May 11, 1979).

These agreements, along with the other agreements and treaties described in the Barr chart, form part of what, in another context, Justice Frankfurter called "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned," and which "may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). They embody the uncontradicted understanding of the Executive and the Congress as to the reach of Article II and the on-going need, demonstrated over nearly two centuries, for broad presidential power to settle claims of American nationals against foreign sovereigns and their nationals in pursuit of the Nation's foreign policy interests.

B. The President's Authority To Settle Claims Is Exercised To Advance National Foreign Policy Objectives; It Exists Independent Of The Request Or Consent Of Individual Claimants.

Petitioner, like other American claimants, has suggested that the long established practice of presidential settlement of private claims against foreign governments and their nationals ceased to be relevant upon enactment of the FSIA in 1976. The argument is, that before 1976, claimants against foreign governments and their nationals faced so many difficulties in enforcing their claims in American courts that they lost nothing when their claims were compromised or disposed of by presidential action. Indeed, it is suggested that such presidential settlements were tolerated as a convenience for American claimants, and may be said to have existed at their sufferance.

This position does not withstand analysis. Private claimants cannot, after all, confer upon the Executive Branch and the President powers not granted to them by the Constitution. Nor is there evidence in the historical record to suggest that presidential settlements were tolerated only because no claimant objected, or that all claimants granted some form of waiver relinquishing their "right" to object to otherwise unconstitutional action. Many claimants, no doubt, have preferred presidential settlement; others would have preferred to litigate.

What we do know, for example, is that the agreement enforced by the decision in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), deprived American claimants of valuable rights. As shown below, private interests of the claimants were plainly sacrificed to the broader national interest of peace with France. The validity of such presidential action has never been made subject to a poll of claimants.

The fact is that, as in the present case, settlement of claims between foreign governments and American nationals frequently involves resolution of larger political and military disputes between nations. One well known example is the recognition of Soviet Russia in 1933 through an executive agreement, a major part of which was the claims settlement discussed in *United States v. Pink*, 315 U.S. 203 (1942), and *United States v. Belmont*, 301 U.S. 324 (1937). Presidential power to compromise private claims must be at its maximum when international crises require solution. As the Court of Appeals for the First Circuit said in the *Main* decision:

> "It is not difficult to understand why it has become generally accepted that the President possesses power, at least in times of crisis in our international relations, to settle the claims of United States nationals against a foreign government." *Main,* slip op. at 19.

To resolve international disputes, the President has sometimes acted alone in disposing of private claims. See *Pink* and *Belmont*. Sometimes he has worked in conjunction with Congress. See *Schooner Peggy, supra*. But whether the President acted on his own or in conjunction with Congress, his power to settle claims derives from the need to act effectively in foreign affairs. The power is not merely an adjunct of the understandable desire of private claimants to maximize their recoveries on commercial claims against foreign nations. As Professor Henkin noted, "[t]he United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." L. Henkin, *Foreign Affairs and the Constitution*, 262-63 (1972).

That this historically vindicated power to settle claims serves the Nation's foreign policy interests, rather than the pecuniary interests of private claimants, is well illustrated by the factual setting to Chief Justice Marshall's decision in *Schooner Peggy, supra*. An American ship had taken the French-owned Schooner Peggy as a prize. Seizure of the French vessel had been authorized by presidential instructions "to take any armed French vessel." 5 U.S. at 103. The United States sued on behalf of itself and the crew to condemn the French ship. The issue thereafter litigated in the lower court was whether the particular French vessel was armed and on the high seas, so as to be within the instructions given the commander of the American ship and, therefore, rightly seized. The Circuit Court of Appeals concluded that the taking was lawful and ordered the ship condemned. Had that decision been affirmed, the crew of the American ship would have been entitled to retain a portion of the prize. See 5 U.S. at 103.

However, while the Circuit Court decision was on appeal, a convention, previously entered into between the United States and France, was ratified by the President. Convention of Peace, Commerce and Navigation, Sept. 30, 1800, as amended, February 18, 1801 (effective Dec. 19, 1801). 1 Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers* 496 (1910). The fourth article of this convention provided that "property captured, and not yet definitely condemned . . . shall be legally restored. . . ."

This convention represented one portion of a complex claims settlement worked out over a period of years between the United States and France in order to resolve disputes which had arisen between the two countries as a result of alleged treaty violations by each nation. Since the bulk of the alleged French violations related to the taking of American vessels, overall settlement of the dispute required resolution of the claims of the various American ship owners as a pre-condition to the larger settlement between the countries.

To satisfy the French on this point and to induce them to drop their substantial claims against the United States for its own treaty violations, the President renounced and thereby

eliminated all claims of private American ship-owners whose ships had been seized by the French. As the Court of Claims later put it, "in the negotiation of 1800 we used 'individual' claims against 'national' claims, and the set-off was of French national claims against American individual claims." *Gray v. United States*, 13 Ct. Cl. 340, 392-93 (1886).[6]

It was against this history, set out in detail in the Court of Claims' 1886 decision in *Gray, supra*, that this Court concluded in 1801 that the intervening convention required reversal of the Circuit Court. Speaking for the Court, Chief Justice Marshall wrote that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law shall be obeyed or its obligation denied." 5 U.S. at 110. The Court recognized the hardship this rule worked on the private parties who had seized the French ship. It held, however, that if private rights were infringed, it was a political question for the political branches of the Government, rather than the Court. In words particularly relevant to this dispute, Chief Justice Marshall concluded:

> "It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation." *Id.*

Recent history does not render irrelevant the decision in *Schooner Peggy*, or the consistent historical practice. The Executive's power derives—as it always has—primarily from foreign policy concerns of the Nation, not the financial in-

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6 In 1886, the Court of Claims in *Gray* was still adjudicating issues arising out of the French convention enforced by the *Schooner Peggy* Court 85 years earlier.

terests of private claimants. The settlement agreements set out in the Barr chart—from the Jay Treaty to the China Claims Settlement—form part of the relevant historical record.

C. Enactment Of The FSIA Did Not Revoke The President's Power To Settle Private Claims.

Some contend that enactment of the FSIA in 1976 renders the long history of claims settlement irrelevant. Petitioner's argument seems to be that the Executive's pre-1976 authority to file "suggestions of immunity" rendered wholly illusory private claims against foreign governments, thereby taking the sting out of presidential claims settlements. Petitioner suggests that once the Executive was deprived of authority to file such "suggestions of immunity," the value of private claims against foreign governments ceased to be illusory, and can no longer be the subject of presidential compromise— even where necessary to resolve international crises. In a variant of the argument, Judge Duffy, in *Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (S.D.N.Y. June 11, 1981), concluded that because the FSIA restructured the manner in which foreign governments are sued in American courts, the allegedly new litigation mode is somehow logically inconsistent with continued existence of presidential power to compromise claims.

There is, in fact, nothing either in the language of the FSIA, in its legislative history, or in the subsequent legislative history of IEEPA or its language, to suggest that Congress shared either of these views. Nor is there any substance to the suggestion that any changes wrought by enactment of the FSIA in 1976 are inconsistent with continuance of presidential power to compromise claims, particularly where necessary to resolve international crises.[7]

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[7] Indeed, at the same time the Executive branch sponsored passage of the FSIA, officials of the Departments of State and Justice testified in Congress against other legislation—never passed—proposing limits on the President's power to make executive agreements. See Hearings Before Senate Subcommittee on Separation of Powers of the Committee on the Judiciary, Congressional Oversight of Executive Agreements, 94th Cong., 1st Sess. (1975). See also Addendum to Brief of Bank Markazi Iran.

Petitioner's argument vastly exaggerates the impact of the FSIA. Suing foreign governments, and recovering on judgments adverse to them, has never been easy. Despite the FSIA, a claimant's lot, like the proverbial policeman's, remains an unhappy one. The Iranian litigation proves the point. Absent the freeze, which prevented a withdrawal of Iran's assets in the United States, no claimant would have been assured satisfaction of judgments obtained against Iran. The FSIA itself exempts central banks from any form of attachment (28 U.S.C. 1611(b)(1)), and Bank Markazi's assets form a large part of those frozen in 1979. Moreover, even under the FSIA, sovereign immunity bars suits against foreign governments unless the defendant has commercial contacts with the United States which have a nexus to the controversy. 28 U.S.C. § 1605(a)(2). Even presence in the forum by itself will not support assertion of jurisdiction. See, e.g., *Thos. P. Gonzales Corp. v. Consejo Nacional Produccion de Costa Rica*, 614 F.2d 1247, 1255 (9th Cir. 1980). And the doctrines of act of state and sovereign immunity remain potent barriers to effective litigation against foreign sovereigns. Accordingly, the sea change assumed by claimants to have occurred in 1976 never happened.[8]

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8 Consider, for example, the underlying Dames & Moore action. It arises out of an alleged contract between Dames & Moore International, S.R.L. ("Dames International"), a Venezuelan limited liability company and the Atomic Energy Organization of Iran ("AEOI"), under which the Venezuelan company was to provide site consulting services in Iran with respect to a nuclear power plant to be constructed there. The 27 Iranian commercial banks named as defendants were strangers to the contract and to the transaction. They were only named in the underlying action as alleged "alter egos" of the defendant AEOI when petitioner sought assets to attach. The banks contended below that the district court lacked subject matter and personal jurisdiction over them (most of the bank defendants had no contact with the United States, and none had any contact here with the requisite nexus to the transaction), and that under the FSIA, and other authorities, the lawsuit and attachments granted against them were untenable. Their extensively briefed and argued motion to dismiss on these grounds was denied by the district court without opinion.

Consider also the recent decision in *Verlinden B.V. v. Central Bank of Nigeria*, No. 80-7413, slip. op. (2d Cir. April 16, 1981). In *Verlinden*, the court held that the FSIA—as a matter of constitutional law—cannot establish subject matter jurisdiction over a claim brought by an alien plaintiff, such as Dames International, against a foreign state, its agencies or instrumentalities, such as Iran, the AEOI, and the banks. Petitioner sued below as the assignee

Nor did passage of the FSIA in 1976 purport to bring about any fundamental change in the President's centuries-old power to resolve international claims under Article II of the Constitution. It did not address that issue at all. What it did was to codify certain elements of the restrictive theory of sovereign immunity.

The FSIA confers no "substantive" rights upon a plaintiff. As the House Report accompanying the FSIA states: "The bill is not intended to affect the substantive law of liability." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 12, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6613. And as the Court of Appeals for the Second Circuit recently held, the FSIA does not "create new federal causes of action . . . ." *Verlinden B.V. v. Central Bank of Nigeria*, No. 80-7413, slip op. at 2566 (2d Cir. Apr. 16, 1981); accord, *AIG*, slip op. at 30-32; *Main*, slip op. at 20-22. The claims of petitioner in the underlying action do not in any sense arise under the FSIA. See *Verlinden*, *supra* at 2565-69.

Prior to the FSIA, the federal courts had subject matter jurisdiction over claims against foreign states under 28 U.S.C. § 1332(a)(2)(1976), as it then read.[9] See *Ex Parte Peru*, 318 U.S. 578, 587-88 (1943). But that grant of subject matter jurisdiction was never held to limit the President's constitutional and statutory power to settle claims against foreign sovereigns and its reenactment in the FSIA does not overrule 200 years of history on this issue. See *AIG*, slip op. at 30-32; *Main*, slip op. at 20-22.

While petitioner is correct in asserting that one aim of the FSIA was to reduce the Executive's role in the sovereign immunity decision, that goal is not inconsistent with the

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of the claim of Dames International. Such an assignment, on the eve of suit, is collusive for purposes of 28 U.S.C. § 1359. Under *Verlinden*, the court below lacked subject matter jurisdiction over the underlying action.

9 28 U.S.C. § 1332(a)(2), in substance unchanged since at least 1875, provided before enactment of the FSIA in 1976:

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between . . .

(2) citizens of a State, and foreign states or citizens or subjects thereof."

Algerian Declarations. What the President has done here has nothing to do with sovereign immunity. The Executive Orders apply whether or not the particular Iranian defendant sued is entitled to sovereign immunity. The Executive Orders do not "suggest" immunity; they settle claims.

As the agreements collected in the Barr chart demonstrate, Presidents have made executive agreements and treaties settling all varieties of expropriation and commercial claims, without regard to the immunity or lack thereof of the defendant sovereign or national. They have made such agreements both in the modern era of the so-called restrictive theory of immunity, as well as during the time when the United States expressly adhered to a more absolute theory of sovereign immunity. The practice has not been changed, either intentionally or inadvertently, by the FSIA.

D. The Long Established Power To Settle Claims Does Not Infringe The Article III Jurisdiction Of The Federal Courts.

Neither exercise by the President of his constitutional powers under Article II to suspend petitioner's lawsuit, nor his constitutional and statutory authority under IEEPA and the Hostage Act (discussed in Point II, *infra*) to void the prejudgment attachments petitioner obtained, offends principles of separation of powers or intrudes upon Congress' power to regulate the Article III jurisdiction of the federal courts. The Algerian Declarations do not purport to regulate the jurisdiction of the federal courts. Rather, the President has compromised and settled claims of American nationals against a foreign sovereign—something which presidents have been doing for nearly 200 years, without regard to the existence of federal court subject matter jurisdiction over such disputes. See *AIG*, slip op. at 24; *Main*, slip op. at 16-22. As shown in section C above, this time-honored practice was in no way affected by enactment of FSIA.

The Algerian Declarations are, in part, a claims settlement agreement. They establish a new rule of law requiring termination of this case and vacation of the attachments. It has been recognized, at least since *Schooner Peggy*, that the courts must

apply such a new rule in pending actions. In *Schooner Peggy*, while appeal from the judgment of condemnation was pending, the United States entered into a treaty with France providing that property captured and not yet "definitively condemned" must be restored. The Supreme Court set aside the lower court's judgment and ordered return of the French ship— which had been condemned by the lower court—because:

> "If subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligations denied." 5 U.S. at 110.

The principle remains a valid one. The law has changed. The underlying litigation—and the others against Iran and its instrumentalities—should be suspended.

II. THE PRESIDENT'S NULLIFICATION OF ALL ATTACHMENTS AGAINST IRANIAN ASSETS WAS A PROPER EXERCISE OF EXPRESS STATUTORY AUTHORITY.

In adhering to the Algerian Declarations, Presidents Carter and Reagan derived their authority not only from the President's constitutional role in foreign affairs, but also from two explicit congressional delegations of power. Here, the President's actions are supported by explicit congressional delegations under IEEPA and the Hostage Act. In resolving the hostage crisis and in attempting to restore relations with Iran, the President acted at the very zenith of his constitutional powers. Where "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer, supra*, 343 U.S. at 635 (Jackson, J., concurring) (footnote omitted).

A. The Language, Purpose And Structure Of IEEPA Empower The Executive To Nullify The Attachments.

1. The Statutory Mandate Is Unabmiguous.

In IEEPA, Congress in 1977 conferred upon the President power to:

> "investigate, regulate, direct and compel, nullify, void, prevent, withholding, use, transfer, withdrawal, transportation, importation or exploration of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest." 50 U.S.C. § 1702(a)(1)(B).

The quoted statutory language was derived from § 5(b) of the Trading with the Enemy Act ("TWEA"), 50 U.S.C. App. § 5(b)—where it continues in force. It has withstood every constitutional test. See *United States v. Yoshida International, Inc.*, 526 F.2d 560, 573 n.16 (C.C.P.A. 1975). The identical emergency powers specified in both acts are necessarily comprehensive and should be liberally construed. As this Court has said, they are to "be given generous scope." *Propper v. Clark*, 337 U.S. 472, 481 (1949).

IEEPA explicitly provides that the President may "direct and compel, nullify, void, prevent or prohibit" the "acquisition," "use," "transfer" or "exercising" of any "right, power or privilege with respect to . . . any property in which any foreign country . . . has any interest." This is more than a mere power to "freeze." The Act gives the President the power first to freeze assets in order to maintain the statuts quo, and then to "direct and compel" the "transfer" of such foreign assets for the purpose of resolving such emergencies. Had Congress intended to give the President no more than a blocking power, it would have omitted the words "investigate," "regulate," "direct," "compel," "nullify" and "void" from IEEPA.

It is true that Congress enacted IEEPA in 1977 as a peacetime alternative to the TWEA, and that during peacetime declared emergencies, the President lacks power to "vest" or take title to foreign assets—a power that he continues to

possess in wartime under the TWEA. But IEEPA expressly grants the President the power to "direct and compel" the transfer of assets, the power to "nullify [and] void" the acquisition or use of "any right power or privilege" with respect to assets, and the power to "prevent or prohibit" the acquisition or exercising of such property interests.[10] As one court recently concluded,

> "IEEPA, however, did not significantly restrict the President's powers during international emergencies. Section 1702 of the IEEPA is, except for stylistic changes, a reenactment of the powers previously conferred on the President by § 5(b) of the TWEA. The only substantive change is the withdrawal of the power to vest assets in an Alien Property Custodian. That power is not sought in this instance and the change is therefore not significant here." *Security Pacific National Bank v. The Government and State of Iran*, slip op. at 25, CV 79-4661RJK (C.D. Cal. Apr. 30, 1981).

The executive orders at issue here carefully track the statutory language of IEEPA. They state that holders of Iranian funds are "licensed, authorized, directed and compelled to transfer" such assets to the Federal Reserve Bank of New York and that "all rights, powers and privileges" relating to Iranian assets derived from any attachment or like proceeding after November 14, 1979 are "nullified." IEEPA explicitly authorized the presidential order directing and compelling this transfer of all Iranian assets. Similarly, IEEPA expressly authorized the President to "void" the exercise of "any right, power or privilege with respect to" Iranian assets. IEEPA definitively rests power in the President to void attachments. A clearer Congressional mandate would, in fact, be difficult to find.

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10 As the Senate report accompanying IEEPA confirms, that statute preserves rather than limits the President's power to resolve American claims against foreign nations. The report states:

"Nothing in this act is intended by the committee to interfere with the authority of the President to continue blocking assets which are presently blocked, *or to impede the settlement of claims of U.S. citizens against foreign countries*." S. Rep. No. 466, 85th Cong. 1st Sess. 5 (1977), *reprinted in* [1977] U.S. Code Cong. & Ad. News 4540, 4544. (emphasis added).

The President has not purported to "vest" title to Iranian assets in the United States; he is not administering those assets as property of the United States. Rather, he has directed and compelled the transfer of assets and is regulating the acquisition of property interests in blocked Iranian assets, as IEEPA expressly authorized him to do.

2. Petitioner's Attachments Were Obtained In The Context Of The President's Exercise Of His IEEPA Powers.

Before petitioner commenced the underlying action or sought any attachment, President Carter, pursuant to his emergency powers under IEEPA, had already blocked the transfer of Iranian assets. The treasury regulations promulgated under the blocking order confirmed that any transfer or acquisition of any interest in Iranian assets by way of attachment or similar process was prohibited and that the license to seek attachments or similar process was conditional and subject to revocation. See, e.g., 31 C.F.R. §§ 535.203, 535.418, 535.502, 535.504.

Once the President had blocked Iran's assets, petitioner's claims to such property were always subject to exercise by the President of the powers available to him under IEEPA. That is the principal teaching of *Orvis v. Brownell*, 345 U.S. 183 (1953), where this Court held that a freezing order prevented a creditor from thereafter acquiring by an otherwise valid judicial attachment any interest or right in property which could be asserted against the Alien Property Custodian under the TWEA. In *Orvis*, the Court did not rely on the *vesting* powers of the TWEA, but rather on the powers to "compel and direct" and "nullify, void, prevent or prohibit" the use or transfer of foreign assets—powers which are granted the President in peacetime under IEEPA. 345 U.S. at 188 n.6.

In *Orvis,* petitioners following the World War II freeze on Japanese assets had brought suit in New York state court against various Japanese nationals who allegedly owed them debts. They obtained valid New York attachments against the assets of Anderson, Clayton & Company, a third party indebted to the Japanese, and thereafter judgments against the Japanese defendants.

The Alien Property Custodian, by *res* vesting orders subsequent to the attachments and judgment, took over the debts owed the Japanese nationals by Anderson, Clayton & Company. Plaintiffs filed a claim seeking return of property in which they claimed an interest. The claim was dismissed by the hearing examiner on the ground plaintiffs lacked the requisite interest. Plaintiffs then sued, alleging that, by virtue of the attachments, they had obtained an "interest, right or title" to the property which had been vested and they could, therefore, properly maintain a suit in the district court under § 9(a) for its return, rather than being relegated to "equitable distribution" under § 34 of the TWEA.

The trial judge agreed. The Second Circuit—a distinguished panel consisting of Judges Augustus Hand, Clark and Frank—198 F.2d 708 (2d Cir. 1952), *sub nom. Orvis v. McGrath* reversed. The court held that "Congress has the power to authorize the nullification of all attachment liens obtained after a freezing order (on the analogy of the effect of bankruptcy on preferences)." *Id.* at 710.

This Court affirmed the conclusion that Orvis had no "right, title or interest" which would entitle him to sue under § 9(a). While concluding that the freeze order did not bar attachment proceedings, the Court held that the order nevertheless prevented a creditor from acquiring by attachment an "interest, right, or title" in the frozen property. 345 U.S. at 188. The Court stated that:

> ". . . [T]he freezing order did have such an effect and that, while it recognized attachment liens insofar as they determined relationships between creditor and enemy debtor, it did not permit the transfer of a property interest in the blocked funds which could be asserted against the Custodian." 345 U.S. at 186-87.

Here, as in *Orvis*, from the moment the President froze Iran's assets, petitioner's attempts at attachment remained subject to the reservation that the President might revoke the license and under IEEPA "nullify, void, prevent or prohibit" or "transfer" interests in the blocked Iranian funds. That is what the President has done. In the words of *Orvis*, "these reservations deprive the assent of much substance; but that

should have been apparent on its face to those who chose to litigate." *Id.* at 187.

3. The President's Orders Have Been Acquiesced In By Congress, Sustained By The Appellate Courts, But Mistakenly Ruled Unconstitutional By Judge Duffy.

The Court of Appeals for the First Circuit in *Main* concluded:

> "Once the blocking order was in place, we do not believe that Main [plaintiff] could obtain such an interest in the blocked assets as would later hamper the President in disposing of them. Main, in fact, proceeded against the 'blocked' Iranian assets only under the provisional Treasury Department license which it had obtained. By the terms of the license and by regulation, Main was prohibited from obtaining a final judgment against the assets or in any other manner levying on the assets to satisfy its claim. In the circumstances, we think Main could acquire no greater 'property interest' than the blocked funds—through 'judicial remedies' or otherwise—than its conditional license and the regulations allowed." *Main,* slip op. at 10 (footnote omitted).

The *AIG* court agreed, stating:

> "In short, we are faced with a situation in which the President is acting pursuant to an unequivocal statutory grant of authority. In this situation, we perceive no erosion of the constitutional principle of separation of powers in upholding the actions of Presidents Carter and Reagan . . ." *AIG,* slip op. at 23 (footnote omitted).

Not only were the President's actions specifically encompassed and authorized by IEEPA, but he has carefully coordinated his actions with the Congress. In issuing the blocking order on November 14, 1979, on each occasion when orders were issued pursuant to the authority of IEEPA, President Carter, and then President Reagan, submitted notice of the action taken to the Congress, as required under the statute. See 50 U.S.C. §§ 1703(b), (c). This included submission of the

terms of the Algerian Declarations and the implementing of Executive Orders. Although specifically authorized by statute to do so, Congress has not sought to reverse, challenge or question the conduct of the President.

Despite this Court's decision in *Orvis*, that to license attachments in the wake of a freeze order might do nothing more than allow claimants to establish relative priorities among themselves, and despite the direct application of *Orvis* to the facts at hand by the *AIG* and *Main* courts, Judge Duffy recently concluded in *Marschalk Co. v. Iran National Airlines Corp., et al.*, No. 79 Civ. 7035 (S.D.N.Y. June 11, 1981), that such a sequence of events somehow created legitimate expectations on the part of claimants that the attached assets would remain in place even were the President to revoke the licenses and order transfer of the assets.

According to Judge Duffy, once a claimant has been licensed to obtain a prejudgment attachment, and has chosen to invest "legal fees" in pursuit of attachments, his rights "vest"—and the President becomes disabled to use a "thaw" as a diplomatic device to free the hostages.[11] That position misstates what a claimant is entitled to believe he obtains under a concededly revocable license, and begs the question of what fruits he has been able to extract prior to revocation.

Given *Orvis*, all that claimants are entitled to expect under the kind of license issued here is a system of "priorities" in the event that the blocking order is one day lifted and the assets freed from the President's IEEPA powers. Judge Duffy, in-

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[11] As Judge Duffy "explained" at pp. 80-81 of his opinion:

"Under the terms of the license herein, plaintiffs were permitted to obtain prejudgment attachments. No conditions were placed on this license other than the fact that the license could be revoked and future attachments prohibited. Thus, the government cannot freely take plaintiffs' attachments any more than it could take away a miner's property interests in minerals which were already mined under a revocable mining license.

"Moreover, in obtaining the attachment it cannot be denied that Marschalk expended large sums of money on attorneys' fees and in obtaining the bond required by New York law. In so doing, it is clear that Marschalk had a reasonable expectation that by relying on the government's action, it would not thereafter have its rights to the attachment nullified by another government action. To argue otherwise means that the government was using the rights and fortunes of individual citizens to create merely another bargaining chip to use in international negotiations."

stead, pressed his analogy of an American national who has been granted a license to extract minerals from federal lands. And he asks whether, upon revocation of such a license, the license holder should be required to "return" any minerals he extracted prior to revocation of the license.

That is not this case. No claimant against Iran has been permitted to extract any "minerals" under his license. Given this Court's decision in *Orvis*, all that a claimant obtained when the President issued the freeze order and the ensuing regulations was *an invitation to stake out his claim* vis-a-vis other potential prospectors. No claimant had any assurance that he would ever be permitted to press his claim to judgment or ever acquire any right to extract real value from the attached assets. Whether claimants should have undertaken the cost of a complaint and attachment procedures was up to them. Not all claimants made that choice. In any event, issuance of the license to obtain prejudgment attachments has not enabled any American claimant to extract any "value" which he is now being called upon to disgorge.

B. The Hostage Act Is An Additional—And Alternative—Basis For The President's Actions.

The Hostage Act of 1868 further supports the President's authority to terminate these lawsuits and to vacate petitioner's prejudgment attachments.[12] The Act was intended to empower the President "to do all he can under the Constitution and laws in every way to secure the release of a citizen." Cong. Globe, 40th Cong., 2d Sess. 4333 (1868) (Remarks of Sen. Williams).

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12 The Hostage Act provides:
"Whenever it has been made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, *and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release*; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress." 22 U.S.C. § 1732 (emphasis added).

The portion of the Act directing the President to use "such means, not amounting to acts of war, as he may think necessary and proper to obtain . . . the release" of any imprisoned American was proposed in an amendment by Senator Williams. In adopting Senator Williams' amendment, the Senate rejected an amendment proposed by Senator Buckalew which would have substituted a milder exhortation that the President was to exert "all his constitutional powers to secure the release of citizens imprisoned abroad." *Id.* at 4330. The Buckalew amendment was regarded as a mere "circumlocution" conferring "nothing in point of fact." *Id.* (Remarks of Sen. Williams).

To secure the release of Americans imprisoned abroad, Congress chose a more express delegation of power. The President was to have every power that the Constitution and Congress might attribute to him, short of the power to make war. A reading of the Congressional debates concerning the Hostage Act reveals that the key disputed issue was whether the statute should merely direct the President to use his own inherent Article II powers to free hostages or whether it should, in addition, delegate powers to accomplish this purpose. Those in favor of delegation were victorious. In support of the bill, Senator Williams noted that the President "is not required to do anything," but that he is "empowered" to do what is "necessary." Among the alternatives mentioned were the power to "suspend commercial relations with the aggressive country," and even the power to "arrest a citizen of that country who may happen to be in the United States." *Id.* at 4233.

The Congressional debates are quite lengthy and a reading of them does not, despite Judge Mikva's observation in his *AIG* concurrence to the contrary, convey the sense that passion had overcome rationality. Rather, the pages of the Congressional Record reveal an articulate, reasoned and informed debate on the relevant questions of international law and Presidential power. One can only conclude that Congress' decision, in essence, to delegate its "necessary and proper" power to Presidents faced with hostage crises was well considered.

Between November 4, 1979 and January 19, 1981 the President used all means he believed "necessary and proper to obtain" release of the hostages. These included imposition of the freeze, followed, after other techniques had failed, by a carefully negotiated thaw.

It is no argument to say that the Hostage Act is old. That is so only because the hostage problem is old, and Congress had to deal with it early in our history. Should Congress wish to repeal the Hostage Act, it may do so. Until Congress acts, the President has explicit and broad delegated authority to deal with hostage crises, authority which he exercised in November 1979 and again in January 1981.

CONCLUSION

If the President's constitutional powers in foreign affairs and the specific authority delegated to him under the Hostage Act and IEEPA mean anything, they must mean that he is to have the power to use a broad and flexible panoply of tactics in order to obtain the release of hostages or to surmount comparable crises. There is nothing in the history of presidential activity in this area to suggest that the President has power to punish but not to make peace, that he has power to threaten but not to compromise, or that he may wield the stick but not—where exigent—proffer the carrot.

The consistent historical tradition set forth in the Barr chart speaks otherwise. So do the language and history of the Hostage Act and IEEPA, and so dictates the logic of any reasoned approach to effective presidential power in foreign policy.

We live in a complicated, hostile world. The United States was conceived in revolution, tested from birth by international crises not of its own making, only to emerge in an age of world war, terrorism, and nuclear blackmail. There is, fortunately, no reason to believe that the Nation's Constitution and governmental institutions are inherently unable to cope with the perils of life on this dangerous planet. Indeed, the very history recalled by the questions presented in this case evince the Founding Fathers' foresight in creating flexible yet principled government.

To attempt now, at the behest of private claimants, to strip the President of the power flexibly to deal with turbulent events, of his authority to change direction as circumstances warrant, and of his ability to make peace as well as war, would be to turn the Constitution into "a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-60 (1963).

The decision of the District Court should be affirmed.

Dated: June 19, 1981

Respectfully submitted,

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ADDENDUM

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision[1]	Amount of Award or Settlement
November 19, 1794	Great Britain and United States	Treaty of Amity Commerce and Navigation (Jay Treaty) (1 Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers* 590 (1910) (hereinafter "Malloy")	a) debts owed by American citizens to British subjects; b) claims of U.S. citizens based on illegal seizures of ships and other property by British government; c) claims of British citizens based on actions of U.S. government	Mixed Commission[2]	Yes	See G.B.-U.S. Treaty, January 8, 1802 (Commission disbanded)
October 17, 1795	Spain and United States	Treaty of Friendship, Boundaries, Commerce and Navigation (2 Malloy 1640)	Maritime captures of U.S. vessels and cargoes by Spanish subjects during war	Mixed Commission	Yes	$325,440.07 to U.S. (Spanish Spoliations)

1 A treaty, executive agreement, or convention is said to have a binding provision if it contains a provision declaring the settlement mechanism specified in the agreement as a final and conclusive determination of the claims at issue.

2 A Mixed Commission consists only of representatives of the parties to the agreement.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
December 7 and 12, 1799*	Netherlands and United States	Case of the Schooner "Wilmington Packet" (5 Miller, *Treaties and Other International Acts of the United States of America* 1075 (1937)) (hereinafter "Miller")	Claims based on seizure of ship by Dutch privateer and condemnation of the ship's cargo by Dutch prize tribunal	Lump Sum Settlement	Yes	20,000 florins to U.S.
September 30, 1800 (concluded), July 31, 1801 (ratified), and December 21, 1801 (proclaimed)	France and United States	Convention of Peace Commerce and Navigation (1 Malloy 496)	Claims of American citizens based on seizures of ships; claims of the French government against the U.S. government based on breaches of the Treaty of 1778	N/A	N/A	Renunciation of claims of American citizens against France and claims of French government against U.S. government; restoration of ships and property captured, but not yet condemned by either country

* An asterisk is placed next to each executive agreement.

January 8, 1802	Great Britain and United States	Convention for Payment of Indemnities and Settlement of Debts (1 Malloy 610)	See G.B.-U.S., Jay Treaty November 19, 1794	Lump Sum Settlement and Mixed Commission	Yes	a) Lump sum of $2,664,000 to British citizens; b) By commission: $11,656,000 to U.S., $143,428.14 to G.B.
August 11, 1802	Spain and United States	Claims Convention (2 Malloy 1650)	Mutual claims based on excesses committed by individuals of both nations during war	Mixed Commission	Yes	No award
April 30, 1803	France and United States	Convention for Payment of Sums Due by France to Citizens of the United States (1 Malloy 513)	Claims for debts owed U.S. citizens by French government for supplies, and claims based on seizures of ships and goods by France	U.S. Commission	No	Approx. 20,000,000 French francs to U.S.
October 20, 1818	Great Britain and United States	Convention Respecting Fisheries, Boundary and the Restoration of Slaves (1 Malloy 631)	Claims for slaves of U.S. citizens taken by British troops during war (based on Treaty of Ghent of 1814)	Third Party Arbitration[3] (later referred to Emperor of Russia)	Yes	See G.B.-U.S., Nov. 13, 1826

3 Third Party Arbitration involves the resolution of a claim by some entity consisting of no representatives of the parties to the agreement.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
February 22, 1819	Spain and United States	Treaty of Amity, Settlement and Limits (2 Malloy 1651)	Florida ceded to U.S.; Mutual claims for damages or injuries suffered up to date of treaty renounced by governments; U.S. govt. agrees to pay claims of U.S. citizens up to $5,000,000	U.S. Commission	Yes	$5,454,545.13 of claims awarded pro-rata from $5,000,000 fund
July 12, 1822	Great Britain and United States	Convention for Indemnity Under Award of Emperor of Russia as to the True Construction of First Article of the Treaty of December 24, 1814 (1 Malloy 634)	Claims for slaves (see G.B.-U.S., October 20, 1818).	Mixed Commission	Yes	See G.B.-U.S., Nov. 13, 1826
March 16, 1825*	United States and Colombia	Convention for Adjusting Certain Claims (3 Miller 195)	a) claim for cargo, loss of profit, injuries and damages of owners of Schooner Liberty; b) claims for vessel, cargo, loss of profit injuries and damages of owners of the Brig Josephine and Schooner Minerva respectively; c) claim	Lump Sum Settlement	(Colombia reserved right of action against individuals whose actions may have caused the	$72,653.40 (plus interest) to U.S.

			for forfeited cargo to owner of cargo of Brig America		settled claims)	
April 19, and 22, 1825*	United States and Russia	Exchange of Notes for the Settlement of the Claim in the case of the Brig "Pearl" (3 Miller 201)	Claim for cargo bound for Northwest coast which was left at Sandwich Islands after Russia representatives ordered American Brig Pearl to leave the area	Lump Sum Settlement	Yes	$16,994.69 to U.S.
November 13, 1826	Great Britain and United States	Convention Relative to Indemnity for Slaves (1 Malloy 641)	Claims for slaves (see G.B.-U.S. October 20, 1818)	Lump Sum Settlement	Yes	$1,204,960 to U.S.
March 17, 1828*	United States and Russia	Settlement of the Claims for the Brig "Hector" and the ship "Commerce" (3 Miller 421)	a) claim of owner of Brig Hector for cost of cargo, value of brig, lost profits; b) claim of owner of ship Commerce for the ship, freight and damage—arising from capture of Hector and Commerce by vessels under the Russian flag	Lump Sum Settlement	Yes	205,731 rubles to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
June 15, 1829*	United States and Brazil	Settlement of Claims (3 Miller 485)	13 claims of owners and shippers for losses and damages suffered by the American ships Sarah George, Rio, Ruth, Hero, Panther Nile, Amity, Hussan, Pioneer, Spermo, Telltale, Hannah and Budget which were seized by Brazilian authorities	Confirmation of 13 claims agreements entered into by Mixed Commission	Yes	Total settlement of all 13 claims from the separate claims agreements Rs. 427,259,546 ($242,845.05) to U.S.
November 25, 1829*	United States and Colombia	Convention for Adjusting Certain Claims (3 Miller 523)	a) claims of owners of Brig Josephine, owners of Schooner Ranger and their cargo for lost profit, injuries and damages resulting from seizure of ships by Colombian authorities	Lump Sum Settlement	Reserved right of owners of Brig Josephine to claim any additional interest to which they were entitled	$20,250.00 to U.S. for Josephine $5,013.59 to U.S. for Ranger
March 28, 1830	Denmark and United States	Claims Convention (1 Malloy 377)	Mutual claims for detention or confiscation of ships and other property	Lump Sum Settlement	Yes	$650,000 Spanish milled dollars to U.S.

			under the authority of either government			(3 person U.S. Bd. of Commissioners to distribute)
July 4, 1831	France and United States	Convention as to Claims and Duties on Wines and Cotton (1 Malloy 523)	Mutual claims for detention or confiscation of ships and other property by either government	Lump Sum Settlement	Yes	25,000,000 francs to U.S.; 1,500,000 francs to France (distributed by each country to its own citizens)
January 19, 1832*	United States and Portugal	Settlement of Claims (3 Miller 653)	Claims for a) the capture of 4 U.S. ships by the squadron of Portugal—the Ann, the Galatea, the Gleaner, the Planter; b) the clothing, and arrest and treatment of the crew of the Galatea	Lump Sum Settlement		Ann—$33,744.42 Galatea—$38,063.85 Gleaner—$7,250.00 Planter—$29,418.90 clothing—$1,260.20 arrest and treatment—$750.00 Total—$110,-487.37 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
October 14, 1832	Two Sicilies (Italy) and United States	Claims Convention (2 Malloy 1804)	Claims for detention or confiscation of ships and other property from 1809-1812	Lump Sum Settlement	Yes	2,115,000 ducats to U.S. (distributed by U.S.)
February 17, 1834	Spain and United States	Claims Convention (2 Malloy 1659)	Adjustment of mutual claims from February 22, 1819—date of this treaty	Lump Sum Settlement	Yes	12,000,000 rials vellon ($549,850.28 distributed by U.S.)
April 11, 1838	Texas (Republic) and United States	Claims Convention (2 Malloy 1779)	Claims based on seizure of ships and personal injuries by officers of govt. of Texas	Lump Sum Settlement	Yes	$11,750 to U.S. (distrib. by U.S.)
March 25, 1839*	United States and Netherlands	Settlement of the Claim for the Ship "Mary" and Her Cargo (4 Miller 179)	Claim for vessel and cargo captured by French privateer, taken to Curacao and sold there	Lump Sum Settlement	All future claims to be referred to U.S.	$62,692.00 to U.S.
April 11, 1839	Mexico and United States	Claims Convention (2 Malloy 1101)	Claims based on injuries to property and persons by Mexican authorities which had been presented to State Dept. or U.S. Ambassador to	Mixed Commission with disputes to King to Prussia	Yes	See Mexico-U.S., Feb. 2, 1848

			Mexico by the date of this convention			
July 7, 1840*	United States and Chile	Agreement for the Settlement of the First Case of the Brig "Macedonian" (4 Miller 287)	Claim for seizures of money totalling $140,000 by Chilean soldiers	Lump Sum Settlement		$104,000 to U.S.
December 10, 1840*	United States and Chile	Agreement for the Settlement of the Case of the Brig Warrior (4 Miller 325)	Claim for seizure and detention of Brig Warrior by Chilean military	Lump Sum Settlement		$15,000 to U.S.
March 17, 1841	Peru and United States	Claims Convention (2 Malloy 1386)	Claims for detention, damage, or confiscation of ships and other property by order of govt. of Peru or under its authority	Lump Sum Settlement	Yes	$421,432.41 to U.S. citizens (after adjudication by Attorney General)
October 15, 1842*	Brazil and United States	Seizure of "John S. Bryan" (5 Moore, *International Arbitrations Digest*, 4613 (1898)	Claims for damages for seizure and detention of ship	Mixed Commission	No	$3,292.07 to U.S.
January 30, 1843	Mexico and United States	Claims Convention (1 Malloy 1105)	See Mexico-U.S., April 11, 1839, and claims presented by date of this new convention	Mixed Commission	N/A	See Mexico-U.S., Feb. 2, 1848

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
February 9, 1843*	United States and New Granada	Convention for the Settlement of Claims Arising Out of the Confiscation of Part of the Cargo of the Schooner "By Chance" (4 Miller 499)	Claim for confiscation of part of cargo belonging to U.S. citizens by New Granadian government	Lump Sum Settlement	Yes	$10,150 to U.S.
February 26 and 29 and March 1, 1844*	Venezuela and United States	Arrangement for the Settlement of the Case of the Brig "Morris" (4 Miller 523)	Claim for vessel Brig Morris and its cargo which were seized by Colombian privateer and subsequently sold	Lump Sum Settlement		$18,000 to U.S.
April 22, 1844*	New Granada and United States	Convention for the Settlement of the Claim Arising out of the Loss of Part of the Cargo of the Schooner "Henrietta" (4 Miller 555)	Claims for certain cargo, owned by U.S. citizen, on the Granadian Schooner Henrietta which was captured in Granadian civil war	Lump Sum Settlement	Yes	$1,243 to U.S.
November 5, 1844*	New Granada and United States	Convention for the Settlement of the Case of the Brig "Morris" (4 Miller 663)	Claim for Brig Morris and its cargo which were seized by Colombian privateer and subsequently sold	Lump Sum Settlement	Yes	$12,756.47 1/2 to U.S.

March 29, 1845*	New Granada and United States	Convention for the Settlement of Claims Arising out of the Seizure of the Schooner "Yankee" (4 Miller 741)	Claims for imprisonment and wages of crew of the schooner Yankee, its cargo and freight charges	Mixed Commission	Yes	$10,891.00 to U.S.
November 10 and 26, 1845*	Great Britain and United States	Settlement of Claims (4 Miller 779)	Claims for excess duties levied by United States over British goods and claims for excess duties levied by Great Britain over United States goods	N/A	Yes	Each government pays claims of its own citizens
May 16, 1846*	New Granada and United States	Convention for the Final Settlement of the Case of the Brig "Josephine" (4 Miller 813)	Claims for nonpayment of certain interest suffered by those interested in the American Brig Josephine	Lump Sum Settlement	Yes	$6,569.14 to United States
November 16, 1846*	Venezuela and United States	Seizure of Brigs "Native" and "Josephine" (12 Bevans, *Treaties and Other International Agreements of the United States of America 1776-1949* at 1052 (1974)) (hereinafter "Bevans")	Claims based on seizure of cargo and ship by Venezuela	Lump Sum Settlement	Yes	$9,550 to U.S. for Native; $5,453 to U.S. for Josephine

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
February 2, 1848	Mexico and United States	Treaty of Guadalupe Hidalgo (1 Malloy 1107)	U.S. agrees to pay all claims of U.S. citizens against Mexico and discharges Mexico's obligations to U.S. citizens	U.S. Board of Commissioners	Yes	U.S. pays $3,208,314.96 to U.S. claimants
April 12, 1848*	Venezuela and United States	Convention upon the Claim Relative to the American Brig "Sarah Wilson" (12 Bevans 1056)	Claim based on detention and sale of ship and cargo by Venezuela	Lump Sum Settlement	Yes	$30,200 to U.S.
April 25, 1848*	New Granada and United States	Convention for the Settlement of the Case of the Brig "Native" (5 Miller at 437)	Claims arising out of the seizure of the Brig Native and its cargo by a Colombian vessel of war	Lump Sum Settlement	Yes	$16,000 to United States
January 27, 1849	Brazil and United States	Claims Convention (1 Malloy 144)	Claims of U.S. citizens	Lump Sum Settlement	Yes	530,000 milreis to U.S. (distributed by U.S.)
June 15, 1849*	Ecuador and United States	Settlement of Cases of Brig "Josephine" and Schooner "Ranger" (7 Bevans 308)	Claims for damages for seizure and detention of ship	Lump Sum Settlement	No Provision	$5,953 to U.S. for Josephine; $1,099 to U.S. for Ranger
July 7, 1849*	Venezuela and United States	Convention Upon the Claim Relative to the	Claim based on seizure and detention of ship	Lump Sum Settlement	Yes	$11,500 to U.S.

		American Brig "Mount Vernon" (12 Bevans 1058)	and loss of cargo			
February 9, 1850*	Ecuador and United States	Settlement of Case of Brig "Morris" (7 Bevans 310)	Claims based on capture and sale of ship by Colombian authorities	Lump Sum Settlement	Yes	$14,016 to U.S.
February 26, 1851	Portugal and United States	Claims Convention (2 Malloy 1458)	Pecuniary claims of U.S. citizens against govt. of Portugal; govt. claim for Brig Armstrong	Lump Sum Settlement (private claims); Third Party Arbitration by Pres. of France on Govt. claim	Yes	$91,727 to U.S.; no award on Brig Armstrong claim
May 1, 1852*	Venezuela and United States	Claims convention Relative to Schooner "Economy" and Others (12 Bevans 1060)	Claims based on confiscations of ships and cargoes	Lump Sum Settlement	Yes	$90,000 to U.S.
August 6, 1852*	Peru and United States	Agreement on Case of Samuel Franklin Tracy (10 Bevans 1017)	Claims based on losses sustained by Tracy for illegal arrest and for actions taken by govt. of Peru against his property	Lump Sum Settlement	Yes	$26,560 to U.S.
February 5, 1853*	Ecuador and United States	Settlement of Case of Brig "Native" (7 Bevans 312)	Claims based on seizure of ship by Colombian authorities	Lump Sum Settlement	Yes	$7,204 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
February 8, 1853	Great Britain and United States	Claims Convention (1 Malloy 664)	Mutual claims since The Treaty of Ghent 1814	Mixed Commission	Yes	$329,734.16 to U.S. $277,102.88 to G.B.
September 10, 1857	New Granada (Colombia) and United States	Claims Convention (1 Malloy 319)	General claims presented before Sept. 1, 1859 to the government of New Granada and claims for damages based on Panama riots of April 15, 1856	Mixed Commission	Yes	$496,235.47 to U.S.
November 8, 1858	China and United States	Claims Convention (1 Malloy 232)	General claims of U.S. citizens at ports of China	Lump Sum Settlement	Yes	$735,238.97 to U.S. (distrib. by U.S. of $489,187.95, surplus returned)
November 10, 1858	Chile and United States	Convention for Arbitration of *Macedonian* Claims (1 Malloy 183)	Claims based on seizure of silver from U.S. citizens by Chilean Admiral Cochran	Third Party Arbitration by King of Belgium	Yes	$42,400 to U.S.
January 14, 1859	Venezuela and United States	Claims Convention (2 Malloy 1843)	Claims of U.S. citizens for damages caused by their eviction from Aves Island	Lump Sum Settlement	Yes	$130,000 to U.S.

February 4, 1859	Paraguay and United States	Claims Convention (2 Malloy 1362)	Claim of United States and Paraguay Navigation Company (U.S. company) that its property was damaged by actions of Paraguay's govt.	Mixed Commission	Yes	No award
July 2, 1860	Costa Rica and United States	Claims Convention (1 Malloy 346)	Claims for property damage and personal injuries caused by authorities of Costa Rica	Mixed Commission (disputes on choice of 3rd commissioner to King of Belgium)	Yes	$25,704.14 to U.S.
November 25, 1862	Ecuador and United States	Claims Convention (1 Malloy 432)	Mutual pecuniary claims upon each government	Mixed Commission (disputes on choice of umpire to British Minister)	Yes	$94,799.56 to U.S.
December 20, 1862	Peru and United States	Claims Convention (2 Malloy 1406)	Claims based on seizure and confiscation of ships Lizzie Thompson and Georgiana by govt. of Peru	Third Party Arbitration by King of Belgium	Yes	No award

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
January 12, 1863	Peru and United States	Claims Convention (2 Malloy 1408)	Mutual pecuniary claims against each government	Mixed Commission	Yes	$57,196.23 to U.S.; $25,300 to Peru
July 1, 1863	Great Britain and United States	Treaty for Settlement of Claims with the Hudson Bay Co. (1 Malloy 688)	Claims of British companies for compensation for land given to U.S. under G.B.-U.S. Treaty of June 15, 1846	Mixed Commission	Yes	$650,000 to British companies
February 10, 1864	Colombia and United States	Claims Convention (1 Malloy 321)	Claims based on Panama riots	Mixed Commission	Yes	$88,267.88 to U.S.
May 4, 1864*	Salvador and United States	Government Monopoly, Arbitration of Claim of Mr. Savage. (2 Moore 1855)	Personal claim for gunpowder that was nationalized	Third Party Arbitration by Guatemala	N/A	$4,497.50 to U.S. (to Savage)
April 25, 1866	United States and Venezuela	Claims by Citizens of the United States against the Government of Venezuela (2 Malloy 1856)	Pecuniary claims of U.S. citizens	Mixed Commission (disputes on choice of umpire to Russia or Switz.)	Yes	$1,253,310.30 to U.S.
July 4, 1868	Mexico and United States	Claims Convention (2 Malloy 1128)	Mutual pecuniary claims for injuries to persons and property by authori-	Mixed Commission	Yes	$4,125,622.20 to U.S.; $150,498.41 to

			ties of either country since Treaty of Guadalupe Hidalgo in 1848			citizens of Mexico
December 4, 1868	Peru and United States	Claims Convention (2 Malloy 1411)	Mutual pecuniary claims since 1863 Commission	Mixed Commission (Disputes to 3rd Nation)	Yes	$194,417.62 to U.S.; $57.040 to Peru
March 14, 1870*	Brazil and United States	Protocol for Submission to Arbitration of Claim Over the "Canada" (5 Moore 4687)	Claim based on seizure of ship and sale of cargo by Brazil	Third Party Arbitration by British Ambassador	Yes	21,150 pounds to U.S.
May 25–June 16, 1870*	Spain and United States	Detention of Ship, "Colonel Lloyd Aspinwall" (2 Moore 1007)	Claim based on detention of ship	Mixed Commission	No	$19,702.50 to U.S.
February 12, 1871*	Spain and United States	Agreement for Settlement of Certain Claims of Citizens of U.S. on Account of Wrongs and Injuries Committed by Authorities of Spain in the Island of Cuba (2 Malloy 1661)	Claims arising out of Cuban insurrection for damages to property and injuries to persons by authorities of Spain	Mixed Commission	Yes	$1,293,450.55 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
May 8, 1871	Great Britain and United States	Treaty of Washington (1 Malloy 700)	Alabama claims based on British failure to maintain neutrality in Civil War and mutual pecuniary claims after Civil War	Joint Commission[4]	Yes	$1,929,819 to Great Britain; $15,500,000 to U.S.
December 6, 1873*	Chile and United States	Protocol for Submission to Arbitration of Claim for the Ship "Good Return" (2 Moore 1466)	Claims based on seizure of ship	Third Party Arbitration by Italian Consul in Chile, then lump sum settlement	No Provision	$18,229.16 to U.S.
August 17, 1874*	Colombia and United States	Seizure and Detention of Ship "Montijo" (5 Moore 4698)	Claims based on seizure and detention of ship	Mixed Commission	Yes	$33,401 to U.S.
February 27, 1875*	Spain and United States	Agreement — The Steamer Virginius (2 Malloy 1664)	Claims based on seizure of ship	Lump Sum Settlement	Yes	$80,000 (to be distributed by U.S. government)
January 15, 1880	France and United States	Claims Convention (1 Malloy 535)	Mutual pecuniary claims based on actions of either country during a)	Joint Commission	Yes	$625,566.35 to France, 13,659 francs to U.S.

4 A Joint Commission consists of representatives of the parties to an agreement and a representative of at least one other nation.

			Franco-German War of 1870-71, b) the "Insurrection of the Commune", c) the France-Mexico War			
May 28, 1881*	Great Britain and United States	Claims of American Fisherman (1881 Foreign Relations of the United States 591)	Claims based on disturbance of Amer. fishing operations by British subjects in Newfoundland	Lump Sum Settlement	Yes	$15,000 to U.S.
1884 (award May 24, 1884)	China and United States	Ashmore Fishery Claim (2 Moore 1857)	Claim for compensation for giving up title to fishery ground	Third Party Arbitration by Ambassadors from G.B. and Netherlands	No Provision	$4,600 to U.S. (to Ashmore)
May 28, 1884*	Haiti and United States	Protocol of an Agreement for Submission to an Arbitration of the Claims of Pelletier and Lazare against Haiti (1 Malloy 932)	Claims for illegal arrest, seizure of properties, and breach of contract by Haitian authorities	U.S. Arbitrator	Yes	$57,250 to Pelletier, $117,500 to Lazare (both set aside by U.S. Sec. of State)
November 17-25, 1884*	Spain and United States	Detention and Sale of Ship "Masonic" (2 Moore 1055)	Claims based on detention and sale of ship	Third Party Arbitration	No Provision	$51,674.07 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
January 25, 1885*	Haiti and United States	Civil Disturbances (2 Moore 1859)	Claims against Haiti for property damage and personal injury after riots	Mixed Commission	No Provision	$14,700 to U.S.
December 5, 1885	United States and Venezuela	Claims Convention (2 Malloy 1858)	Pecuniary claims of U.S. citizens	Mixed Commission disputes over choice of 3rd Comm. to Russia or Switz.	Yes	$980,572.60
December 5, 1885 and October 5, 1888	Venezuela and United States	Review Commission (2 Malloy 1858 and 1866)	Pecuniary claims of U.S. citizens	Extension of prior commission	Yes	See U.S.-Venezuela Dec. 5, 1885
November 29, 1886 and December 7, 1886	Spain and United States	Claim of Antonio Maximo Mora (Moore, *Treaties and Executive Agreements*, 1905 Political Science Quarterly 385)	Claim of individual based on embargo of his property in Cuba	Lump Sum Settlement		$1,500,000 to U.S.
April 9, 1888	Morocco and United States	Illegal Arrest (Darby, *International Tribunals*	Claim based on arrest of American consul by	Mixed Commission		

		505 (3rd ed. 1900)) (hereinafter "Darby")	Moorish authorities			
May 24, 1888*	Haiti and United States	Protocol of an Agreement for Submission to an Arbitrator of the Claim of Charles Adrien Van Bokkelen (2 Moore 1813; 1 Malloy 935)	Claim based on arrest and imprisonment	Referee	Yes	$60,000 to U.S.
December 6, 1888	Denmark and United States	Agreement Submitting Claim of Carlos Butterfield & Co. to Arbitration (1 Malloy 387)	Seizure and detention of ships Ben Franklin and Barque Catherine Augusta by the authorities of the island of St. Thomas of the Danish West Indies	Third Party Arbitration by British Ambassador in Greece	Yes	No Award
August 13, 1890	Great Britain and United States and Portugal	Railway Concession (Darby 506)	British and U.S. claims based on rescission of railway concession and seizure of the railroad by Portuguese govt.	Third Party Arbitration by Swiss Confederation		28,000 pounds (on account) to U.S. and G.B.
June 13, 1891*	United States and Great Britain vs. Portugal	Protocol Between the United States, Great Britain, and Portugal in Reference to Arbitration of Claims Against Portugal (2 Malloy 1460)	British and U.S. claims based on recission of railway concession by Portugal	Third Party Arbitration by Swiss confederation	Yes	15,314,000 Swiss francs to G.B. and U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
January 19, 1892	United States and Venezuela	Claims Convention—Venezuelan Steam Transportation Company (2 Malloy 1868)	Claims based on seizure of ships and other property, and imprisonment of U.S. citizens	Mixed Commission (with 3rd Nation)	No	$141,800 to U.S.; $300 to Venezuela
August 7, 1892, May 24, 1897	Chile and United States	Claims Convention (1 Malloy 185)	Mutual pecuniary claims based on acts of civil or military authorities of either country	Mixed Commission	Yes	$240,564 to U.S.
February 28, 1893	Ecuador and United States	Claims Convention—Julio R. Santos (1 Malloy 438)	Claim of individual based on wrongful imprisonment and injuries to person and property by authorities of Ecuador	Third Party Arbitration by British Ambassador in Ecuador	Yes	$40,000 to U.S.
March 2, 1897*	Mexico and United States	Protocol Concerning Claims of Oberlander and Messenger (2 Malloy 1180)	Claims based on personal injuries to Oberlander and Messenger by Mexican citizens	Third Party Arbitration by Minister of Argentina at Madrid	Yes	No award
May 24, 1897*	Chile and United States	Claims Protocol (1 Malloy 190)	Claim of Patrick Shields for personal damages	Lump Sum Settlement of individual claim	Yes	$3,500 to U.S.

June 14, 1897	Ecuador and United States	Guayaquil and Quito Railway Co.	Claims of U.S. citizens based on spoliation of property and property rights by virtue of taking by Ecuador of the railway	Mixed Commission	No Provision	
July 26, 1897*	Siam and United States	Protocol Concerning Claim of Cheek (Darby 514)	Claim of Cheek based on seizure of property and interference with his teak concession; claim of Siam based on breach of loan agreement	Third Party Arbitration by Chief Justice of G.B.'s Sup. Ct. for China and Japan	Yes	706,721 tieals to U.S. ($200,000)
September 20, 1897 (date of award)	Siam and United States	Military Assault (Darby 514)	Claim based on attack by Siamese soldiers on Mr. E.V. Kellet	Mixed Commission		In favor of U.S.
February 1898*	Dominican Republic and United States	Ozama River Bridge (7 Bevans 183)	Claim based on interference by Dominican Rep. govt. with concession to build and operate a bridge	Mixed Commission	No Provision	$74,411.17 to U.S.
May 17, 1898*	Peru and United States	Protocol of an Agreement for the Arbitration of the Amount of Damages to be Awarded in Favor of Victor H. MacCord (2 Malloy 1443)	Claim for personal injuries caused by Peruvian authorities	Third Party Arbitration by Chief Justice of Canada	Yes	$40,000 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
December 10, 1898	Spain and United States	Treaty of Peace (2 Malloy 1690)	Mutual claims arising out of insurrection in Cuba—Spain and U.S. mutually relinquish all claims of their citizens against each other	N/A	Yes	U.S. to pay all claims of its citizens
October 18, 1899 and June 30, 1900*	Haiti and United States	Protocol of an Agreement Between the United States and Haiti, For The Arbitration of the Question of the Liability and Amount of Damages to be Awarded John D. Metzger and Company (8 Bevans 646)	Claims for seizure and sale of goods, and for breach of contract for sale of lumber by Haitian govt.	U.S. Arbitrator	Yes	$23,000 to U.S.
November 7, 1899	Germany, Great Britain, and United States	Convention Between United States, Germany and Great Britain Relating to Settlement of Samoan Claims (2 Malloy 1589)	Personal claims based on military action of the three nations in the Samoan Island	Third Party Arbitration by King of Norway and Sweden	No	U.S. and G.B. responsible for losses
February 23, 1900 and May 10, 1900*	Guatemala and United States	Protocol of an Agreement Submitting to Arbitration The Claim of Robert H. May Against	Mutual claims based on contracts in connection with the Guatemala Northern Railroad	Third Party Arbitration by British Consul to	Yes	$143,750.73 to U.S.

		Guatemala and the Claim of Guatemala Against Said May (1 Malloy 871 and 873)	(claim of May was against Guatemalan govt.)	Guatemala		
March 22, 1900*	Nicaragua and United States	Protocol of an Agreement for the Arbitration of the Amount of Damages to be Awarded Orr and Laubenheimer and the Post-Glover Electric Company (2 Malloy 1290)	Claims based on seizures of property by Nicaragua, including ships Buena Ventura and Alerta and other goods	Third Party Arbitration	Yes	$6,963 to Orr, $1,402.94 to Company
September 8, 1900*	Russia and United States	Claims Protocol (2 Malloy 1532)	Claims based on seizure of ships James Hamilton Lewis, C.H. White, Kate and Anna, Cape Horn Pigeon	Third Party Arbitration by Mr. Asser of the Netherlands	No	$38,650 to Pigeon, $28,588 to Lewis, $32,444 to White, $1,448 to Kate
September 7, 1901*	United States and China	Boxer Claims (1 Bevans 302)	Claims for damages to property and persons (protocol covered claims of Germany, Austria-Hungary, Belgium, Spain, France, G.B., Italy, Japan, Netherlands, Russia, and United States)	U.S. Commission (for American claimants)	No Provision	Total of 450,000,000 taels to all powers (some to U.S. claimants)

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
December 19, 1901*	Salvador and United States	Protocol for the Arbitration of Certain Claims Against Salvador (2 Malloy 1568)	Claims of Salvador Commercial Co. and other U.S. citizens for damages	Joint Commission	Yes	$537,178.64 to claimants
February, 1902*	Salvador and United States	Claim of Rosa Gelbtrunk (1902 Foreign Relations of the United States 873)	Claim of Rosa Gelbtrunk	Joint Commission	No Provision	No Award
April 28, 1902*	Dominican Republic and United States	Arbitration of Sala Claim (7 Bevans 184)	Claim of Madam de Sala as surviving partner of J. Sala & Co. for debts owed by Dominican Government	Mixed Commission	No Provision	$215,812.95
May 22, 1902*	Mexico and United States	Protocol for the Adjustment of Certain Contentions Arising Under What is Known as the "Pious Fund of the Californias" (2 Malloy 1194)	Claim for interest upon an annual fund	Mixed Commission and umpire from the Hague	Yes	$1,420,682.67 lump sum and $43,050.99/year to U.S.
September 6, 1902*	United States and Brazil	Protocol Submitting to Arbitration the Claim of George C. Benner et al. (1 Malloy 152)	Claim based on damage to vessel James A. Simpson from shooting by Brazilian soldiers	Third Party Arbitration by Swedish Envoy to U.S.	Yes	No award

January 31, 1903*	Dominican Republic and United States	Arbitration Protocol—Claim of San Domingo Improvement Co. (1 Malloy 414)	Claim for damages for withdrawal of Co. from Dominican Republic; indemnity for relinquishment of rights, properties, and interests	Lump sum settlement and Arbitration of Terms	Yes	$4,500,000 to U.S., relinquishment by Co. of all rights, properties and interest
February 17, 1903*	United States and Venezuela	Protocol with Venezuela Submitting to Arbitration Claims Against Venezuela (2 Malloy 1870)	Claims of U.S. citizens	Mixed Commission (umpire named by Queen of Netherlands)	Yes	$2,313,711.37
May 7, 1903*	Venezuela and Great Britain, United States, et al.	Protocols of Agreements Respecting the Reference of the Question of the Preferential Treatment of Claims to the Tribunal at the Hague (2 Malloy 1872)	Order of preference between nations (choice between Blockading Powers and Creditor Powers)	Arbitration by Tribunal at the Hague (chosen by Emperor of Russia)	Yes	Germany, G.B. and Italy get preference from 30% of Venezuelan customs revenues
November 25, 1904*	Honduras and United States	Cases of Charles W. Renton and Jacob Baiz (8 Bevans 888)	Claims of U.S. citizens	Lump Sum Settlement	Yes	120,000 pesos to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
February 13, 1909*	Venezuela and United States	Claims Protocol (2 Malloy 1881)	Claims of U.S. companies (Orinoco Steamship Co., Orinoco Corporation, and United States and Venezuela Company) based on contracts for mining in Venezuela	3 Arbitrators from Permanent Court of Arbitration at the Hague	Private Settlement Allowed	$475,000 to U.S. and Venezuela Company; $385,000 to Orinoco Company
May 25 and September 18, 1909*	Nicaragua and United States	Protocol for Arbitration of the Claim of the George D. Emery Company (10 Bevans 365)	Claim for damages based on annulment of timber concession by govt. of Nicaragua	Mixed Commission (disputes over choice of 3rd comm. to King of G.B.); then Lump Sum Settlement	Yes	$600,000 to U.S.
December 1, 1909*	United States and Chile	Protocol for Arbitration of the Alsop Claim (6 Bevans 548)	Claim of Alsop & Co. for property losses	Third Party Arbitration by King of G.B.	Yes	2,275,375 bolivanos to U.S.
August 18, 1910	Great Britain and United States	Special Agreement for the Submission to Arbitration of Pecuniary Claims (3 Malloy 2619)	Mutual pecuniary claims based on denials of property rights, alleged wrongful collection of	Mixed Commission (disputes over choice	Yes	

			customs duties and other charges, and damages to property or persons by the military of either nation	of Umpire to the Hague)		
January 28, 1911*	China and United States	Agreement in Settlement of Changsha Indemnity Claims (3 Malloy 2512)	Claims of U.S. citizens after disturbances in Hunan province led to property damage	Specified Individual Settlements	Yes	$74,392.53 (or 53,934.58 Hankow taels)
April 4, 1911	Nicaragua and United States	Claims Commission (U.S. For. Rel. 1911-631; 10 Bevans 374)	Claims for damages based on abolition of monopolies, concessions, and leases by Nicaragua	Mixed Commission	No Provision	3 awards to Nicaragua, rest to U.S.
November 27, 1915*	Panama and United States	Protocol Providing for the Determination of the Amount of Damages Caused by the Riot at Panama City, July 4, 1912 (3 Malloy 2778)	Claims for deaths and injuries due to riot, Panama concedes liability, issue as to damages	Third Party Arbitration by Netherlands	Yes	$12,500 to U.S.
October 3, 1919*	Haiti and United States	Protocol for the Establishment of a Claims Commission (3 Malloy 2678)	Pecuniary claims of U.S. citizens and subjects	Joint Commission	No	Payable out of $40,000,000 national loan
May 21, 1921*	Peru and United States	Protocol for the Arbitration of the Landreau Claim Against Peru (3 Malloy 2797)	Claims for rewards owed for discovery of guano deposits and for breach of contract by govt. of Peru	Joint Commission	Yes	$125,000 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
August 10, 1922*	Germany and United States	Agreement for a Mixed Commission to Determine the Amount to be Paid by Germany in Satisfaction of Germany's Financial Obligations under the Treaty Concluded Between the Two Governments on August 25, 1921 (3 Malloy 2601)	Claims based on treaty of peace for damage to or loss of property, and debts	Mixed Commission	Yes	More than $265,939,068.37 to U.S.
September 8, 1923	Mexico and United States	General Claims Convention (U.S. Treaty Series, 678; 4 Malloy 4441)	Mutual pecuniary claims for losses or damages to persons or property since July 4, 1868	Mixed Commission (disputes over choice of 3d commission to the Hague)	Yes	
September 10, 1923	Mexico and United States	Special Claims Convention for the Settlement of Claims of American Citizens Arising from Revolutionary Acts in Mexico from November 20, 1910 to May 31, 1920 (U.S. Treaty Series, 676; 4 Malloy 4445)	Claims for losses or damages to persons or property arising out of the revolution in Mexico	Mixed Commission (disputes over choice of 3d commissioner to the Hague)	Yes	See U.S.-Mex., April 24, 1934

December 24, 1923*	Turkey and United States	American Claims (H.R. Doc. No. 283, 73d Cong., 2 Sess. p. 3; 11 Bevans 1105)	Mutual pecuniary claims of nationals of both countries	Mixed Commission	No Provision	$1,300,000 to U.S.
November 26, 1924*	Austria-Hungary and United States	Agreement Concerning Obligations (U.S. Treaty Series, 730; 4 Malloy 3928)	Claims of U.S. nationals for damage or seizure of property, death or injury of persons, and debts	Third Party Arbitration	Yes	$370,032.14 to U.S. from Austria; $443,-588.79 to U.S. from Hungary
July 28, 1926	Panama and United States	Convention on Claims (4 Malloy 4546; U.S. Treaty Series No. 842)	Mutual pecuniary claims based on losses or damages to persons or property since Nov. 3, 1903; Claims for losses of U.S. citizens due to fire in the city of Colon on March 31, 1885)	Mixed Commission; Joint Commission (with Colombia for Colon fire)	Yes	
January 2, 1927	Cuba and United States	Attempted Expropriation of Property	Claims of Smith for land seizure	U.S. Arbitrator	No Provision	$190,000 to U.S.
May 19, 1927*	Great Britain and United States	Arrangement for the Disposal of Certain Pecuniary Claims Arising Out of the Recent War (Detention of the S.S. "Lisman", Capture of U.S.S.S. "Edna", Capture of U.S.S.S. "Seguranca") (4 Malloy 4256)	Mutual agreement not to present claims of nationals, and to use funds saved to pay such claims of a country's own nationals	N/A	N/A	

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
March 30, 1928*	China and United States	American Claims for Acts of Chinese Soldiers (MSS Dept. of State)	Claims based on damages to persons and property by Chinese soldiers	Mixed Commission		$443,588.79 to U.S.
June 20, 1929*	Spain and United States	Outstanding Claims (Executive Agreement Series #18; 11 Bevans 687)	Mutual claims	Mixed Commission	No Provision	
October 1, 1929*	Cuba and United States	Indemnity for Damages (49 Arbitration Series #1; MSS Dept. of State)	Claim of Charles Harrah for wrongful destruction of his property by Cuban authorities	Mixed Commission		$350,000 to U.S.
November 22, 1929*	Guatemala and United States	Case of P. W. Shufeldt (8 Bevans 507)	Claims of breach of contract for illegal cancellation of concession for extraction and exportation of chicle against the govt. of Guatemala	Third Party Arbitration by Chief Justice of Sup. Ct. of British Honduras	No Provision	$225,468.38 to U.S
January 20, 1931*	Egypt and United States	Damages Resulting from Acts of the Egyptian Authorities against George J. Salem (Executive Agreement Series #33)	Claim of Salem for mistreatment by Egyptian authorities and courts	Mixed Commission		No award

November 16, 1933*	U.S.S.R. and United States	Litvinov Assignment (11 Bevans 1257)	U.S. gives up claims based on Soviet nationalizations of property of U.S. nationals; U.S.S.R. assigns to U.S. amounts that may be due from U.S. nationals to U.S.S.R.	N/A	N/A	N/A
April 24, 1934	Mexico and United States	Convention Providing for En Bloc Settlement of Special Claims (5 Malloy 4487)	General claims of U.S. nationals from Special Claims Convention of Sept. 10, 1923	Lump Sum Settlement	Yes	Based on percentage Mexico recovered from other nations
April 10, 1935	Mexico and United States	Claims Arising from Revolutionary Acts (Amer. J. Int'l Law, Off. Doc. 1938-107)	Claims of U.S. nationals except those from other settlements	U.S. Claims Commission	No Provision	
April 15, 1935	Canada and United States	Claims: Damages Resulting From Operation of Smelter at Trial, British Columbia (6 Bevans 60)	Claims based on damages caused by fumes from smelter of the Consolidated Mining and Smelting Co.	Lump Sum Settlement (for damages prior to Jan. 1, 1932); Mixed Commission	No Provision	$350,000 to U.S. for pre-Jan. 1, 1932 damages; No award for post-Jan. 1, 1932 damages

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
November 9, and 12, 1938*	Mexico and United States	Compensation for Expropriated Lands (9 Bevans 1038)	Claims based on expropriations of agrarian land by Mexican govt.	Mixed Commission	No Provision	See U.S.-Mexico Nov. 19, 1941
November 19, 1941	Mexico and United States	Final Settlement of Certain Claims (9 Bevans 1059)	Claims filed by U.S. and Mexico with commission established Sept. 8, 1923; agrarian claims of U.S. nationals against govt. of Mexico which arose between Aug. 30, 1927 and Oct. 7, 1940; mutual claims for property damage caused by acts of either govt. between Jan. 1, 1927 and Oct. 7, 1940	Lump Sum Settlement	Yes	$40,000,000 to U.S.
November 19, 1941*	Mexico and United States	Expropriation of Petroleum Properties (9 Bevans 1055)	Claims based on right to compensation for expropriation of petroleum properties by Mexico	Experts from Both Countries	Yes	See U.S.-Mexico Sept. 25 and 29, 1943
Sept. 15 and 29, 1943	Mexico and United States	Payment for Expropriated Petroleum Properties (9 Bevans 1150)	See U.S.-Mexico Nov. 19, 1941	Lump Sum Settlement	Yes	$23,995,991 to U.S.
August 14, 1947	Italy and United States	Agreement on Claims of U.S. Nationals (The	Claims of U.S. nationals arising out of WWII	Mixed Commission	No Provision	$5,000,000 to U.S. (claims

		Lombardo Agreement) (61 Stat. 3988; 36 U.N.T.S. 105)	against both Italy and Italian nationals			determined by Foreign Claims Settlement Commission (FCSC))
July 19, 1948*	Yugoslavia and United States	Agreement Regarding Pecuniary Claims of the United States and its Nationals (Lillich and Weston, International Claims: Their Settlement by Lump Sum Agreements, Part II, 10 (hereinafter "Lillich and Weston"); 62 Stat. 2658, T.I.A.S. No. 1803)	Claims of U.S. nationals based on nationalizations and other takings by Yugoslavia of property of U.S. nationals	Lump Sum Settlement	Yes	$17,000,000 to U.S. (U.S. claims determined by International Claims Commission (ICC) and later by FCSC)
January 26, 1950	Panama and United States	Agreement Regarding Pecuniary Claims (Lillich and Weston, 35; 1 U.S.T. 685, T.I.A.S. No. 2129)	Mutual claims: Panama claim for fire damage; U.S. claims of injuries, seizures of property, and nationalizations	Lump Sum Settlement	Yes	$53,800 to Panama; $3,156 to U.S. for injuries; $400,000 to U.S. for property (claims determined by ICC and FCSC)

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
February 27, 1953	Germany and United States	Settlement of Indebtedness of Germany for Awards Made by the Mixed Claims Commission (4 U S.T. 908; T.I.A.S. 2796)	Claims based on bonds issued for pre-war indebtedness of Germany to U.S. nationals	Lump Sum Settlement	Yes	$97,500,000 to U.S.
March 30, 1960*	Rumania and United States	Agreement Relating to Financial Questions Between the Two Countries (Lillich and Weston, 217; 11 U.S.T. 317; T.I.A.S. No. 4451)	Claims of U.S. nationals based on contracts acquired prior to Sept. 1, 1939 and payable prior to Sept. 15, 1947, and nationalizations and other takings by Rumania of property of U.S. nationals	Lump Sum Settlement	Yes	$24,526,370 to U.S. ($22,026,-370 from blocked assets) ($2,500,000 in 5 annual installents) (claims determined by FCSC)
July 16, 1960*	Poland and United States	Agreement on Claims of United States Nationals (Lillich and Weston, 227; 11 U.S.T. 1953; T.I.A.S. No. 4545)	Claims of U.S. nationals based on nationalizations and other takings by Poland of property of U.S. nationals; and debts owed by nationalized enterprises	Lump Sum Settlement	Yes	$40,000,000 to U.S. (in 20 annual installments) (claims determined by FCSC)

July 2, 1963*	Bulgaria and United States	Agreement on Claims of United States Nationals (Lillich and Weston, 266; 14 U.S.T. 969; T.I.A.S. No. 5387)	Claims of U.S. nationals based on contracts, and nationalizations by Bulgaria of property of U.S. nationals	Lump Sum Settlement	Yes	$3,543,398 to U.S. ($3,143,-398 from blocked assets) (claims determined by FCSC)
November 5, 1964*	Yugoslavia and United States	Agreement on Claims of United States Nationals (Lillich and Weston, 308; [1965] 1 U.S.T. 1; T.I.A.S. No. 5750)	Claims of U.S. nationals based on nationalizations by Yugoslavia of property of U.S. nationals between July 19, 1948 and date of this agreement	Lump Sum Settlement	Yes	$3,500,000 to U.S. (5 annual installments)
March 25, 1965	Canada and United States	Agreement Concerning the Establishment of an International Arbitral Tribunal to Dispose of United States Claims Relating to Gut Dam (17 U.S.T. 1566; T.I.A.S. 6114)	Damages caused to real property of U.S. citizens by construction and maintenance of Dam	Mixed Commission (disputes over choice of 3rd member to Int'l Ct. of Justice)	No (claimant may accept decision of tribunal as final)	See U.S.-Canada, Nov. 18, 1968
November 18, 1968*	Canada and United States	"Gut Dam" Settlement (Lillich and Weston, 360; 19 U.S.T. 7863; T.I.A.S. No. 6624)	See above	Lump Sum Settlement	No	$350,000 to U.S.

Date	Parties	Title of Agreement	Description of Claims	Form of Tribunal	Binding Provision	Amount of Award or Settlement
April 18, 1969*	Japan and United States	Agreement Concerning the Trust Territory of the Pacific Islands (20 U.S.T. 2654; T.I.A.S. No. 6724)	Claims of nationals of U.S. trust territory of the Pacific Islands arising out of WWII	Lump Sum Settlement	Yes	$5,000,000 from U.S. to trust territory; $5,000,000 from Japan to trust territory
March 6, 1973*	Hungary and United States	Agreement Regarding the Settlement of Claims (24 U.S.T. 511; T.I.A.S. 7569)	Claims of U.S. nationals based on contracts acquired prior to Sept. 1, 1939 and payable prior to Sept. 15, 1947, and nationalizations by Hungary of property of U.S. nationals	Lump Sum Settlement	Yes	$18,900,000 to U.S. (also Hungary drops claim for $3,318,614 in blocked assets) (claims determined by FCSC)
February 19, 1974*	Peru and United States	Claims Settlement (25 U.S.T. 227; T.I.A.S. 7792)	Claims of U.S. nationals and Peru based on road construction contracts; claims of U.S. nationals of nationalizations and expropriations by Peru of property of U.S. nationals	Lump Sum Settlement	Yes	$76,000,000 to U.S. (distrib. by U.S. Sec. of State); Peru drops claims against U.S. nationals

May 1, 1976*	Egypt and United States	Claims Settlement (27 U.S.T. 4214; T.I.A.S. 8446)	Claims of U.S. nationals based on Egyptian nationalizations and expropriations of property of U.S. nationals	Lump Sum Settlement	Yes	$10,000,000 to U.S. (six semiannual installments) distrib. by U.S. as it chooses
September 22, 1976*	Peru and United States	Agreement Regarding Claim of Marcona Mining Company (27 U.S.T. 3993; T.I.A.S. 8417)	Claim based on nationalization of assets of Marcona Mining Co. by Peru	Lump Sum Settlement	Yes	$61,440,000 to U.S.
May 11, 1979*	People's Republic of China and United States	Agreement Concerning the Settlement of Claims (T.I.A.S. No. 9306 (1979))	Claims of U.S. nationals based on Chinese nationalizations and expropriations of property of U.S. nationals between October 1, 1949 and May 11, 1979	Lump Sum Settlement	Yes	$80,500,000 to U.S. (accompanied by release of blocked assets)
May 19, 1979*	Egypt and United States	Agreement Concerning the Settlement of Claims (T.I.A.S. No. 9589)	Claims of U.S. nationals reserved by May 1, 1976 Egypt-U.S. agreement	Lump Sum Settlement	Yes	$100,000 to U.S.